(10)

No. 96-667-CFY Title: United States, Petitioner
v.
Robert E. Hyde

Docketed: October 29, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Oct 28 1996	Petition for writ of certiorari filed. (Response due December 23, 1996)
	Nov 18 1996	Order extending time to file response to petition until December 23, 1996.
	Dec 23 1996	Brief of respondent Robert E. Hyde in opposition filed.
	Dec 23 1996	Motion of respondent for leave to proceed in forma pauperis filed.
	Dec 30 1996	DISTRIBUTED. January 17, 1997
	Dec 31 1996	Reply brief of petitioner United States filed.
	Dec 31 1996	LODGING consisting of 10 copies of Minutes of the Advisory Committee on Federal Rules of Criminal Procedure, October 7-8, 1966, Gleneden, Oregon received from the Solicitor General and distributed.
	Jan 17 1997	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jan 17 1997	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 28, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 28, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 9, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT April 15, 1997. **********
	Jan 30 1997	Motion of respondent for appointment of counsel filed.
	Feb 10 1997	DISTRIBUTED. February 14, 1997 (Page 53)
	Feb 18 1997	Motion for appointment of counsel GRANTED and it is ordered that Jonathan D. Soglin, Esquire, of Oakland, California, is appointed to serve as counsel for the respondent in this case.
	Feb 27 1997	Joint appendix filed.
	Feb 27 1997	Brief of petitioner United States filed.
	Mar 6 1997	CIRCULATED.
	Mar 27 1997	Record filed.
	Mar 28 1997	Brief of respondent Robert E. Hyde filed.
	Mar 28 1997	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Apr 4 1997	Record filed.
	Apr 9 1997	Reply brief of petitioner United States filed.
	Apr 15 1997	ARGUED.
	Apr 23 1997	Letter from counsel for the respondent received and distributed.

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WALTER DELLINGER
Acting Solicitor General
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42 pp

QUESTION PRESENTED

Whether a defendant has an absolute right to withdraw his guilty plea after the district court has accepted it but before the district court has decided whether to accept or reject an accompanying plea agreement.

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In the Supreme Court of the United States

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No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-5a) is reported at 82 F.3d 319 and as amended (see App., *infra*, 6a-7a) at 92 F.3d 779. The order of the district court denying defendant's motion to withdraw his guilty plea (App., *infra*, 8a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1996. A petition for rehearing was denied on

July 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE AND GUIDELINES PROVISIONS INVOLVED

Rules 11 and 32(e) of the Federal Rules of Criminal Procedure and Sentencing Guidelines § 6B1.1(a) are reproduced at App., *infra*, 19a-26a.

STATEMENT

1. On December 13, 1991, a grand jury in the Northern District of California returned an indictment charging respondent as principal and as accessory with three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of wire fraud, in violation of 18 U.S.C. 1343; and two counts of receiving stolen property, in violation of 18 U.S.C. 2315. Appellant's C.A. E.R. 1-11. The charges arose from a bogus loan brokerage scheme, under which respondent would allegedly promise to obtain loans on behalf of his victims, in return for their payment of up-front application fees. Although the victims paid the fees, respondent allegedly failed to arrange for the loans. App., *infra*, 9a.

2. On November 29, 1993, the date set for the commencement of trial, respondent and the government entered into a written plea agreement. Appellant's C.A. E.R. 21-29. That agreement provided that respondent would plead guilty to two of the mail fraud counts and to the two counts charging receipt of stolen property. *Id.* at 21. The agreement also provided that the government would move to dismiss the remaining four counts with which respondent was charged, *id.* at 22, and would not bring further charges based on respondent's participation in the loan brokerage scheme or based on certain other past activities of respondent, *id.* at 23. Finally, the

agreement stated that respondent and the government agreed on a number of details concerning the application of the Sentencing Guidelines to this case and the calculation of the amount of restitution that should be ordered. *Id.* at 24-26. The agreement recognized, however, that "[t]he district court will be free to make its own determinations pursuant to the Guidelines" and it stated that "[t]he defendant understands that the final decision as to which Guidelines apply rests with the court." *Id.* at 26.

That same afternoon, respondent pleaded guilty in open court to the four counts specified in the plea agreement. The court addressed respondent and ascertained that respondent knew the nature of the charges and possible punishment, that respondent was willing to waive his various trial rights by virtue of his guilty plea, and that respondent's plea was knowing and voluntary. Appellant's C.A. E.R. 39-46. The court also ascertained that respondent understood the plea agreement, the obligations it imposed on each party, and the continuing final authority of the court to determine an appropriate sentence in accord with the Sentencing Guidelines. *Id.* at 46-49.

Of particular relevance to this case, the court informed respondent that "I may accept or reject [the plea] agreement today, or I may reserve ruling to accept or reject the plea agreement pending completion of the presentence report." Appellant's C.A. E.R. 49. The court asked respondent to state in his own words what he had done that led him to plead guilty to each of the four counts. The court also asked the government to set forth the factual basis for each charge, and the court confirmed that defendant agreed with the government's statements about the offenses.

Id. at 50-62. The court asked respondent whether he had committed the crimes charged, and respondent replied "Yes, your honor, I did." *Id.* at 62. The court then reviewed the maximum sentences that could be imposed, *id.* at 63-65, and the court ascertained that respondent had no objection to the advice he had received from his advisory counsel, *id.* at 65-66. Finally, the court inquired how respondent pleaded to each of the four counts. With respect to each count, respondent answered, "Guilty, your honor." *Id.* at 66. The court accepted the guilty pleas and stated that it "reserves ruling on whether to accept the plea agreement pending completion of the presentence report." *Id.* at 67. The court also filed a written order providing "that the defendant's plea of 'GUILTY' be accepted." *Id.* at 20.

3. On December 23, 1993, respondent filed a motion to withdraw his guilty plea on grounds of duress, claiming that the prosecutor and other Justice Department officials had threatened harm to his wife. App., *infra*, 10a. There followed a series of proceedings, including a hearing at which respondent failed to present evidence supporting his claim, see *ibid.*; respondent's submission of a "vague and conclusory" unsigned, unsworn statement by respondent's wife, *id.* at 11a; and an evidentiary hearing at which respondent introduced the testimony of his wife and daughter, and the government introduced the testimony of the FBI agent who was alleged to have threatened respondent's wife, see *id.* at 12a.

On July 19, 1994, the court issued a memorandum and order denying respondent's motion to withdraw his plea. The court noted that, under Fed. R. Crim. P. 32(e), a defendant may withdraw a guilty plea before sentencing "upon a showing by the defendant of any

fair and just reason." See App., *infra*, 12a. In this case, the court held, "[t]here is absolutely no credible evidence to support [respondent's] claim" of duress. *Id.* at 13a. The court also found that "[t]here is * * * no evidence that [the FBI agent] improperly threatened or coerced [respondent's wife]." *Id.* at 14a. Finding that "the defendant lacks any semblance of credibility," *id.* at 16a, the court ruled "that the defendant entered his guilty plea knowingly, voluntarily and intelligently." *Ibid.* The court also rejected respondent's claim that the court had committed error under Rule 11 at the guilty plea hearing. App., *infra*, 16a-17a.

The court subsequently sentenced respondent to 30 months' imprisonment, to be followed by three years' supervised release, and ordered that he make restitution in the amount of $477,990. Appellant's C.A. E.R. 127-132.

4. The court of appeals reversed. The court held that the requirement of Fed. R. Crim. P. 32(e) of a "fair and just reason" for withdrawing a plea of guilty was inapplicable in this case. The court observed that "when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the court must permit the withdrawal." App., *infra*, 2a. The court noted respondent first moved to withdraw the plea almost a month after the court had accepted it, but concluded that that fact was irrelevant, because the district court had not yet accepted the plea agreement. The court explained that

> [t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement

> carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated that it accepted [the] plea.

Id. at 3a (quoting *United States* v. *Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, No. 95-9101 (Oct. 7, 1996)). The court concluded that

> [i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire.

App., *infra*, 4a. The court therefore reversed respondent's conviction "so that he can plead anew." *Ibid.*

Judge Ferguson filed a brief concurring opinion (App., *infra*, 5a), in which he stated that in his view the result in this case followed from the Ninth Circuit's decision in *United States* v. *Cordova-Perez*, *supra*. In that case, the district court accepted a defendant's guilty plea, but after reviewing the presentence report, the court concluded that it could not accept the plea agreement, which provided for dismissal of charges that could have resulted in a high mandatory minimum sentence. *Cordova-Perez*, 65 F.3d at 1554. The Ninth Circuit affirmed the district court's determination in that situation to vacate the defendant's guilty plea and set the matter for trial. *Id.* at 1555-1557. Judge Ferguson had dissented from that decision, and he stated here that he continued to believe that *Cordova-Perez* was wrongly decided. He stated, however, that "when [the government] advocated the result in *Cordova-Perez*, it must live with the mistake," which in his view entailed permitting

the defendant to withdraw his guilty plea for no reason at all in this case. App., *infra*, 5a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that a defendant who has pleaded guilty to a crime, but who has also entered into a plea agreement, may withdraw his guilty plea for any reason at all—or for no reason—at any time before the court's acceptance of the plea agreement. In most circumstances, district courts postpone a decision whether to accept a plea agreement until a presentence report has been prepared and the court has had the opportunity to review it. Accordingly, under the Ninth Circuit's ruling, a knowing and voluntary guilty plea entered into with full procedural safeguards and due formality in open court has no legal significance for a period of months, until the presentence report has been prepared and the court has determined whether to accept the plea agreement. Throughout that period, under the Ninth Circuit's rule, the defendant remains entirely free to withdraw his plea; his confession and plea of guilty amount merely to a statement by the defendant that he may or may not have committed the crime and that he may or may not demand a trial on the charges of which he is accused.

The Ninth Circuit's decision is contrary to express provisions of the Federal Rules of Criminal Procedure. It also conflicts with the decisions of the two other courts of appeals that have addressed the issue. Finally, the decision threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases. This Court's review is therefore warranted.

1. Rule 11 of the Federal Rules of Criminal Procedure contains a set of detailed requirements that must accompany the entry and acceptance of a guilty plea. The rule provides that, "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," a number of crucial facts. Fed. R. Crim. P. 11(c). Those include the nature of the charge, the maximum and minimum penalties to which the defendant will be subject, and the defendant's rights to representation by an attorney at every stage of the proceeding, to trial by jury, to confront and cross-examine witnesses, and to the privilege against compelled self-incrimination. *Ibid.* The court must also ensure, "by addressing the defendant personally in open court," that the defendant's plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d). In addition, the court "should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f).

The detailed requirements of Rule 11 are based on the recognition "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). As the Court in *Brady* explained, "[c]entral to the plea * * * is the defendant's admission in open court that he committed the acts charged in the indictment." *Ibid.* The procedures required for entering a guilty plea are therefore designed to ensure that the defendant knows precisely the significance and consequences of making that admission. Where the proper procedures are followed and where the defendant has publicly admitted to having committed the offense charged, the defendant's admission is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975).

The court of appeals' holding that a guilty plea may be withdrawn at any time before accepting the plea agreement conflicts with the Federal Rules of Criminal Procedure. The Rules do not state or imply that a court that defers decision on whether to accept a plea agreement thereby grants the defendant a license to withdraw his guilty plea at will. To the contrary, the Rules contain two provisions addressing the circumstances under which a plea of guilty may be withdrawn. The court of appeals' decision is inconsistent with both of those provisions.

Rule 11(e)(4) specifically provides that the defendant has an absolute option to withdraw his guilty plea under one circumstance—where the court rejects the plea agreement. See Rule 11(e)(4) ("If the court rejects the plea agreement, the court shall * * * afford the defendant the opportunity to withdraw the plea."). The rationale for that rule is that if the court rejects the plea agreement, the defendant will not receive the benefit of the bargain that induced him to plead guilty; the defendant should therefore have the option to abrogate the agreement and return the situation to the status quo ante. The court of appeals' decision renders that rule superfluous in most cases, by providing the defendant with an unqualified right to withdraw the plea *regardless* of whether the district court accepts or rejects the plea agreement.

The court of appeals' holding is also inconsistent with the requirements of Fed. R. Crim. P. 32(e), which governs when a plea may be withdrawn. Under Rule 32(e), "[i]f a motion to withdraw a plea of guilty * * * is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Although that standard on its face applies to this case, the court of appeals refused to apply it. By permitting a defendant to withdraw a guilty plea regardless of whether he has any reason for doing so, the court of appeals' decision is directly contrary to the terms of Rule 32(e).[1]

[1] The court of appeals' reliance on *Cordova-Perez* was misplaced. App., *infra*, 3a. In *Cordova-Perez*, the court rejected a plea agreement that called for the government to dismiss a greater charge and for the defendant to plead guilty to a lesser-included charge. It then vacated the defendant's guilty plea to the lesser included charge and ordered that the case go to trial. Under Rule 11(e)(4), after rejecting the plea agreement, the court should have inquired whether the defendant still wanted to plead guilty to the lesser included charge before vacating his plea. The defendant, however, did not complain of that error (which in any event would have been easily curable had the defendant simply informed the court that he still wanted to plead guilty to the lesser charge). Instead, the defendant argued that the court erred in permitting trial on the greater charge. The court of appeals correctly rejected that claim. Rule 11(e)(4) plainly envisions that the court's determination not to accept a plea agreement calling for dismissal of certain charges ordinarily will lead to a trial on those charges. The fact that a defendant may have an absolute right to withdraw a guilty plea when the court defers decision on a plea agreement and then *rejects* it (as in a situation like *Cordova-Perez*) does not suggest that a defendant has the same right when the court defers decision on a plea agreement and then *accepts* it (as occurred here).

2. The decision of the court of appeals conflicts with decisions of the Fourth and Seventh Circuits, the only other courts of appeals that have directly addressed the issue.

In *United States* v. *Ewing*, 957 F.2d 115 (4th Cir.), cert. denied, 505 U.S. 1210 (1992), the defendant pleaded guilty in open court after the exhaustive colloquy required by Rule 11, and the court accepted the plea. 957 F.2d at 117. Like respondent, the defendant then moved to withdraw his plea on the ground of coercion. Like the district court in this case, the district court in *Ewing* concluded that the defendant had not established a "fair and just reason" for withdrawing the plea under Rule 32(e), and the court therefore proceeded to sentencing. 957 F.2d at 117.

On appeal, the defendant argued that until the district court has accepted the plea agreement, the defendant "should be able to withdraw his plea upon some showing of cause less demanding than the current fair and just reason standard." 957 F.2d at 118. The court rejected that argument because of "its failure to acknowledge the distinction between a plea of guilty and a plea agreement." *Ibid.* The court noted that the district court had "explicitly accepted [the defendant's] *plea of guilty* immediately following the Rule 11 colloquy," but that it had "defer[red] acceptance of the *plea agreement* until it had an opportunity to review the presentence report." *Ibid.* The court explained that "once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea only in two ways relevant here, either by showing a fair and just reason under Rule 32(d), or by withdrawing under Rule 11(e)(4) after a rejected plea agreement." 957 F.2d at 119.

In *United States* v. *Ellison*, 798 F.2d 1102 (1986), cert. denied, 479 U.S. 1038 (1987), the Seventh Circuit reached the identical conclusion on virtually identical facts. The defendant pleaded guilty to four offenses. The district court accepted the guilty plea but deferred its decision whether to accept a plea agreement that required the government to move to dismiss other charges and not to recommend consecutive sentences. 798 F.2d at 1103. Three days before sentencing, the defendant attempted to withdraw his guilty plea on the ground that it was the product of "psychological pressures" and the advice of counsel. *Id.* at 1104. The court denied the motion, finding that there was no defect in the plea proceedings and that the guilty plea had been knowing and voluntary.

On appeal, the defendant advanced essentially the same claim advanced by the defendant in *Ewing* and respondent here: That, despite Rule 32(e)'s "fair and just reason" standard, Rule 11 "requires application of a different standard for withdrawal of guilty pleas entered pursuant to plea agreements that have not yet been accepted by the court." 798 F.2d at 1105. The court rejected that argument, explaining that "to preserve the integrity of the plea-taking process, Congress limited withdrawal of a plea to those situations where defendant demonstrates a fair and just reason." *Id.* at 1106. Therefore, the court held, "there is no absolute right to withdraw a plea prior to acceptance of the plea agreement by the court." *Ibid.*

3. The rule adopted by the court of appeals has damaging implications for the federal criminal system. The vast majority of pleas of guilty in federal

court are accompanied by plea agreements.[2] In such cases, both the Federal Rules of Criminal Procedure and the Sentencing Guidelines provide for deferral of the district court's decision whether to accept a plea agreement. Under Rule 11(e), a court has discretion to defer acceptance of the plea agreement until a presentence report has been prepared and the court has had the opportunity to review it.[3] Under the

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[2] See Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1974 Amendments ("guilty pleas account for the disposition of as many as 95% of all criminal cases," and "[a] substantial number of these are the result of plea discussions"); see also *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system"); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions * * * leads to prompt and largely final disposition of most criminal cases.").

[3] If the government has agreed either to drop certain charges (under Rule 11(e)(1)(A)) or that a specific sentence is appropriate (under Rule 11(e)(1)(C)), the Rules expressly provide that "the court may accept or reject the agreement, or may defer its decision * * * until there has been an opportunity to consider the presentence report." Fed. R. Crim. P. 11(e)(2). Insofar as the plea agreement in this case provided that the government would drop certain charges against respondent, it falls within that rule. The court and the parties treated the plea agreement as having been made under Rule 11(e)(1)(A). See Appellant's C.A. E.R. 49.

The Rules also provide that the government may agree in a plea agreement to make a recommendation regarding the sentence that is not binding on the court (under Rule 11(e)(1)(B)). The Rules contemplate that, where a district court rejects such a recommendation, the defendant has no right to withdraw his guilty plea. See Fed. R. Crim. P. 11(e)(2) (the court "shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea"). Insofar as the plea agreement in

Sentencing Guidelines, deferral of a decision whether to accept the plea agreement until the court can review the presentence report is mandatory in most cases.[4] By so deferring a decision on accepting the plea agreement, the court may ensure that the results of the plea bargaining process are consistent with the public interest in the just disposition of criminal charges. In addition, the court may fulfill its obligation "to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." United States Sentencing Comm'n, *Guidelines Manual*, Ch. 6, Pt. B (introductory comments) (Nov. 1, 1995) (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 63, 167 (1983)).

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this case provided that the parties agreed to a certain treatment of petitioner's sentence under the Sentencing Guidelines, it could be construed to fall within that rule. The parties and the court at the plea agreement proceeding, however, treated the agreement as having been made pursuant to Rule 11(e)(1)(A) because the government did not make any specific recommendation as to the appropriate sentence. Appellant's C.A. E.R. 49; see also App., *infra*, 17a. Because the district court did not reject any portion of the plea agreement in this case, the question whether the plea agreement was in fact based in part on Rule 11(e)(1)(B) is of no consequence.

[4] Sentencing Guidelines § 6B1.1(c) provides that "[t]he court shall defer its decision * * * to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1." Sentencing Guidelines § 6A1.1 in turn provides that "[a] probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record."

The result of the Rule 11 and Sentencing Guidelines provisions is that, after accepting a plea of guilty, a district court will ordinarily defer a decision whether to accept a plea agreement for a period of months or longer, until at or near the time of sentencing. Indeed, preparation of a presentence report ordinarily will commence only after the guilty plea is accepted, and when the presentence report is completed, the case is ready for sentencing. Under the Ninth Circuit's rule, during the entire period between the court's acceptance of the guilty plea and sentencing, the defendant has the absolute right to withdraw his guilty plea.

The court of appeals made quite clear that, under its ruling, the defendant need not satisfy any standard of cause to withdraw his guilty plea during that period. Nor need the defendant show that the plea was involuntary, misinformed, or defective in any way. Under the court of appeals' ruling in this case, the defendant need only state he changed his mind: "If the court defers acceptance of the plea *or* of the plea agreement, the defendant may withdraw his plea for any reason or for no reason." App., *infra*, 4a (emphasis added).

That holding encourages defendants to engage in manipulation and gamesmanship. For example, a defendant may delay a trial several months or longer—and put the government and the court to the substantial expense of needlessly delaying the trial and preparing and reviewing a presentence report—simply by entering into a plea agreement and guilty plea on the eve of trial and then withdrawing his plea just before sentencing. A defendant may also in effect delay his decision whether to plead guilty until he has had the opportunity to review the presentence report,

at which time the defendant's expectations about his sentence may be less optimistic than at the time of the guilty plea.

Finally, the court of appeals' decision reduces respect for judicial proceedings. It converts the defendant's solemn confession of guilt, made in open court during a guilty plea proceeding, into a statement that is revocable at will and that in most cases will have no legal effect unless and until the defendant later decides that it is advantageous to adhere to it. Because the court of appeals' holding will produce those adverse consequences for the administration of criminal justice, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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OCTOBER 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. CR-91-00672-SBA
No. 95-10113

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT E. HYDE, DEFENDANT-APPELLANT

Appeal From The United States District Court
For The Northern District Of California
Saundra B. Armstrong, District Judge, Presiding

[Argued and Submitted April 8, 1996]
[Decided April 30, 1996]

OPINION

Before: WARREN J. FERGUSON, DOROTHY W. NELSON, and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge FERNANDEZ; Concurrence by Judge FERGUSON.

FERNANDEZ, Circuit Judge:

Robert Elmer Hyde was indicted for mail fraud and wire fraud. *See* 18 U.S.C. §§ 1341, 1343, 2(b). He then entered into a plea agreement and entered his guilty plea. The district court accepted the guilty plea but reserved ruling on the acceptance of the plea

agreement until it had seen the presentence report. Long before that report was prepared, Hyde moved to withdraw his plea. The district court determined that he had not given a sufficient reason to justify withdrawal. Thus, it denied his motion and went forward to judgment and sentencing. Hyde appealed. We reverse and remand.

STANDARD OF REVIEW

We review for an abuse of discretion the district court's denial of a motion to withdraw a guilty plea. *See United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir.1995). A failure to apply the correct legal principles is an abuse of discretion. *See Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 292 (9th Cir.1989).

DISCUSSION

The government argues and the district court found that Hyde did not offer a "fair and just reason" to withdraw his plea. Fed.R.Crim.P. 32(e). However, we have held that when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the district court must permit the withdrawal. *See United States v. Washman*, 66 F.3d 210, 212-13 (9th Cir.1995); *United States v. Savage*, 978 F.2d 1136, 1137 (9th Cir.1992), *cert. denied*, 507 U.S. 997, 113 S.Ct. 1613, 123 L.Ed.2d 174 (1993). As we said in *Washman*:

> We need not decide whether Washman had a "fair and just" reason for withdrawing his plea pursuant to Fed.R.Crim.P. 32(e) because we hold that Washman should have been allowed to withdraw his plea without offering any reason. The reason is that, at the time Washman moved to withdraw from the plea agreement, the district court had not yet accepted the plea. Under our precedent, Washman and the Government were not bound by the plea agreement until it was accepted by the court.

66 F.3d at 212 (citations omitted).

But, the government argues, the district court did accept Hyde's plea even if it did not accept the plea agreement. That is a distinction without a difference. As we have held, "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea." *United States v. Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir.1995) (citations omitted).

We have heard the government's ululation that the Sentencing Guidelines prohibit an early acceptance of pleas. United States Sentencing Guidelines § 6B1.1(c)[1] provides that:

> The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report. . . .

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[1] Because of *ex post facto* considerations, the district court used the Guideline Manual in effect July 15, 1988. This provision, however, remains the same to this day.

The government's concern is a bit overstated because a close reading of the Guideline shows that some plea agreements may still be accepted at the time of the plea. However, the Guidelines undoubtedly take away much of the discretion that a district court would otherwise have.[2] *See* Fed.R.Crim.P. 11(e)(1) & (2). Nevertheless, if the Sentencing Commission's interference with district court discretion causes practical difficulties regarding pleas, as well it may, that is a situation to which the Commission can turn its attention.

CONCLUSION

When a defendant seeks to plead guilty, the district court must hold a plea hearing. Fed.R.Crim.P. 11. According to that Rule, the court may then accept, reject, or defer a decision on acceptance or rejection. Fed.R.Crim.P. 11(e). If the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire. Fed.R.Crim.P. 32(e).

Thus, the district court erred when it refused to allow Hyde to withdraw his plea. We therefore reverse his conviction and remand so that he can plead anew.

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[2] At the time relevant to this case, stand-alone policy statements were not necessarily binding. *See United States v. Forrester*, 19 F.3d 482, 483-84 (9th Cir.1994). Now they are. *See United States v. Plunkett*, slip op. 3417, 3422, 74 F.3d 938 (9th Cir. Mar. 12, 1996) (No. 95-95-30053).

REVERSED and REMANDED for further proceedings.

FERGUSON, Circuit Judge, concurring.

While I concur in the opinion of this case, I write in order to restate my dissent in *United States v. Cordova-Perez*, 65 F.3d 1552 (9th Cir.1995).

I continue to believe that case was decided incorrectly and that an injustice was done. Yet the government insisted upon the result. Now it would like us to disregard *Cordova-Perez*, which of course would be a monumental disaster. The government cannot have it both ways. When it advocated the result in *Cordova-Perez*, it must live with the mistake.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-10113
D.C. No. CR-91-00672-SBA

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT E. HYDE, DEFENDANT-APPELLANT

Appeal From The United States District Court
For The Northern District Of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted
April 8, 1996- San Francisco, California

Filed April 30, 1996
Amended July 29, 1996

ORDER, DENIAL OF PETITION FOR REHEARING, REJECTION OF SUGGESTION FOR REHEARING EN BANC, AND AMENDED OPINION

Before: WARREN J. FERGUSON, DOROTHY W. NELSON, and FERDINAND F. FERNANDEZ, Circuit Judges.

Opinion by Judge FERNANDEZ;
Concurrence by Judge FERGUSON.

ORDER

The opinion filed April 30, 1996, commencing at slip op. 5097, is amended as follows: footnote 2 at slip op. 5101 is replaced with the following:

> [2]At the very least, the district court must consider policy statements. We need not decide whether they are binding absent a departure. *Compare United States v. Forrester*, 19 F.3d 482, 483-84 (9th Cir. 1994) *with United States v. Plunkett*, 74 F.3d 938, 940 (9th Cir. 1996). Whether they are binding or not, the result of this case remains the same.

With the opinion thus amended, the panel has unanimously voted to deny the appellee's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT OF THE
NORTHERN DISTRICT OF CALIFORNIA

No. CR 91-0672 SBA

UNITED STATES OF AMERICA, PLAINTIFF

v.

ELMER ROBERT HYDE, DEFENDANT

[Filed July 19, 1994]

ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA

On June 2, 1994, this Court conducted an evidentiary hearing on defendant's motion to withdraw his guilty plea. After having considered the papers submitted in connection with the motion and the testimony of the witnesses at the evidentiary hearing, the Court finds that defendant's motion should be denied.[1]

[1] The Court notes that defendant filed a variety of "motions" subsequent to filing his motion to withdraw his guilty plea. Defendant has styled these submissions a Motion for Dismissal of All Charges in the Interests of Justice, Petition for a Writ of Habeas Corpus, Motion to Dismiss this Case in the Best Interest of Justice, and Motion to Withdraw Breached Guilty Plea. The crux of these motions is essentially the same—namely, that the defendant should be released because he did not commit the crimes charged in the Indictment. Because these motions are duplicative of the instant motion before the Court, each of these motions is denied.

BACKGROUND

Defendant Elmer Hyde was charged with masterminding and operating a bogus loan brokerage scam. Defendant effected this scheme by holding himself out as a loan broker and president of a company known as the Money Brokers Association ("MBA"). Under the guise of the MBA, defendant would promise to obtain loans on behalf of the prospective applicants in exchange for up-front application fees. Defendant Hyde accepted the fees despite never having arranged for the financing.

The Government charged the defendant with the following violations: (1) 18 U.S.C. § 1341—mail fraud (Counts 1, 4, 5); (2) 18 U.S.C. § 1343—wire fraud (Counts 6, 7, 8); (3) 18 U.S.C. § 2315—receiving stolen property (Counts 2, 3); and (4) 18 U.S.C. § 2(b)—wilfully causing an offense against the United States (Counts 1-8). The core allegations are contained in Count I. The remaining Counts charge defendant with various statutory violations for conduct related to the scheme.

Trial was set to commence on November 29, 1993. On the first day of trial but prior to the commencement of any proceedings, the Government and the defendant informed the Court that they were in the process of negotiating a plea agreement. Later that same day, defendant pled guilty to Counts I through IV of the Indictment as part of a written plea agreement filed with the Court. Before taking the defendant's plea, the Court extensively voir dired defendant pursuant to Federal Rule of Criminal Procedure 11 to verify that his change of plea was knowing, voluntary and intelligent.

On December 23, 1993, defendant filed a motion to withdraw his guilty plea on the ground that he entered his plea under duress. Specifically, defendant claims that he feared for his wife's life based on threats of harm allegedly made by the prosecutor in this case, Assistant United States Attorney Joel Levin, and other identified Justice Department employees.

On March 15, 1994, the Court conducted a hearing on defendant's motion. Defendant appeared in Court pro se with Michael Stepanian, his Court-appointed standby counsel.[2] During the hearing, the Court informed defendant that he had failed to present any cognizable evidence to support his claim that his plea was coerced or was otherwise the product of duress. The Court, however, permitted defendant until March 22, 1994, to allow Mrs. Carole Hyde, defendant's wife, to submit a sworn declaration setting forth the specific factual bases for his allegation that she had been harassed by the government.

Mrs. Hyde submitted her unsworn and unsigned declaration on March 21, 1994. In that declaration, Mrs. Hyde averred that Federal Bureau of Investigations Agent Robert Schenke ("Agent Schenke") came to her home in August 1993, and acted in a "menacing manner." (*See* Carole Hyde Decl. ¶ 3.) She alleges that he threatened her with arrest and made unspecified "threats" concerning her job. (*Id.*, ¶ 6.) Mrs Hyde

[2] Also set for hearing on this date was Defendant's Renewed Motion to Dismiss for Prejudicial Delay and Defendant's Ex Parte to Remove Assistant Counsel Michael Stepanian for Sexual Harassment and Other Acts or Moral Turpitude. The Court denied the motion to dismiss but granted to motion to remove standby counsel.

concludes that she "did influence [defendant] him to plea (sic) guilty because of [her] fears, he was conerned for [her] safety."

On April 7, 1994, after reviewing Mrs. Hyde's declaration, this Court scheduled an evidentiary hearing on defendant's motion. The Court's Order stated, in part:

> Mrs. Hyde's declaration is both vague and conclusory. Nevertheless, because there is some suggestion—however tenuous—that defendant entered his guilty plea under duress, it is important that the Court allow the parties to develop the requisite factual record from which the Court can determine, under the totality of the circumstances, whether plaintiff's plea was completely voluntary. *Iaea v. Sunn*, 800 F.3d 861, 866 (9th Cir. 1986).

Order (filed April 7, 1994) at 2. The Court set the evidentiary hearing for April 26, 1994.

On April 19, 1994, one week prior to the date scheduled for the evidentiary hearing, defendant filed a document styled as a "Request for Court's Compulsory Processes (sic) to Obtain Witnesses for Evidentiary Hearing April 26, 1994." In this document, defendant requested that the Court issue subpoenas to compel the attendance of ten witnesses for the evidentiary hearing.[3] The Court liberally construed this request as one made under Federal Rule of Criminal Procedure 17, which governs the issuance of subpoenas in criminal cases. Because defendant failed to make the requisite proffer required under Rule 17,

[3] Included in defendant's list was Judge Patel of this Court, a Time magazine correspondent, and several federal prisoners.

the Court denied defendant's request. *See* Order (filed April 26, 1994). The Court, however, granted defendant leave to file an amended Rule 17(b) request with the necessary information.[4] The Court also ordered defendant to provide information to show his financial inability to pay the fees of the witnesses. This additional information was due by May 12, 1994. The Court vacated the evidentiary hearing set for April 26, 1994, to allow defendant sufficient time to prepare his renewed Rule 17 request.

Defendant failed to file a renewed Rule 17 request. Thus, on May 13, 1994, this Court issued an Order rescheduling the evidentiary hearing for June 2, 1994. At the hearing, defendant presented the testimony of his wife, Carol Hyde, and his daughter, Crystal Hiddleston. The Government proffered Agent Schenke. The Court took the defendant's motion to withdraw his guilty plea under submission at the close of the evidentiary hearing.

DISCUSSION

A. *Legal Standard*

A defendant has no right to withdraw a guilty plea. *United States v. Castello*, 724 F.2d 813, 814 (9th Cir. 1984). Nevertheless, the Federal Rules of Criminal Procedure permit a defendant to withdraw a guilty plea prior to sentencing "upon a showing by the defendant of any fair and just reason." Fed. R. Civ. P.

[4] Specifically, the renewed Rule 17 request was to be accompanied by a written statement which indicated, for each witness: (a) the nature of the testimony to be elicited; (b) the relevance of such testimony to the issue of whether defendant's guilty plea was involuntary; and (c) an explanation of why the witnesses' testimony is necessary to the adjudication of the voluntariness issue.

32(d). The burden is on the defendant to present a "plausible reason for withdrawal." *United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980). A "change of heart" alone is insufficient. *United States v. Turner*, 898 F.2d 705, 713 (9th Cir. 1990). The court has "broad discretion" in deciding whether to allow the withdrawal of a guilty plea. *United States v. Rios-Ortiz*, 830 F.2d 1067, 1070 (9th Cir. 1987).

B. *There is No Evidence To Support Defendant's Claim of Coercion*

In the present case, defendant seeks to withdraw his guilty plea because he claims it was the product of duress. A guilty plea which is the result of coercion or duress is not voluntary, and hence, is invalid. *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986). In such cases, "[the] concern is not solely with the subjective state of mind of the defendant, but also with the constitutional acceptability of the external forces inducing the guilty plea." *Id.* While threats made against third parties are not per se coercive, they should be carefully considered by the Court in assessing the voluntariness of a plea. *See Castello*, 724 F.2d at 815. Thus, in determining voluntariness, the court looks to the "totality of the circumstances." *Iaea*, 800 F.2d at 866.

Here, defendant asserts that he was coerced into entering a guilty plea based on threats allegedly made against his wife by Agent Schenke. There is absolutely no credible evidence to support this claim.[5] At the evidentiary hearing, Mrs. Hyde admitted that at no time did she advise the defendant to plead guilty on

[5] There was also no evidence of misconduct or coercive behavior by any other person.

her account. She further testified that she had repeatedly urged the defendant *not* to plead guilty and that he should contest the charges in the indictment. In fact, Mrs. Hyde's last advice to the defendant was to plead not guilty.[6]

There is also no evidence that Agent Schenke improperly threatened or coerced Mrs. Hyde. Agent Schenke first made contact with Mrs. Hyde in August 1993, after the defendant had temporarily absconded. Agent Schenke visited Mrs. Hyde as part of his standard FBI investigation into the defendant's whereabouts. Although Mrs. Hyde testified that she felt "terrorized" and "harassed" by Agent Schenke's presence, there is no evidence that he made any threats against her other than to warn her that harboring a fugitive was illegal. In addition, Mrs. Hyde admitted on cross-examination that Agent Schenke never threatened her and that he told her there would be no problem so long as she cooperated in his investigation. In light of her in-court testimony, the Court finds that Mrs. Hyde's allegations of coercion are simply incredible.

In contrast to the paucity of evidence to support the alleged governmental coercion, defendant has repeatedly admitted his guilt while under oath. (*See* Application to Enter a Guilty Plea ¶¶ 5, 23.) Similarly, in the Application to Enter a Guilty Plea and the Plea Agreement (both filed on November 29, 1993), defendant represented to the Court that his decision to enter a guilty plea was not "forced or coerced by any

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[6] Defendant's claim that he plead guilty at the insistence of his wife is further undermined by Mrs. Hyde's testimony that she had *no contact* with him during the plea negotiations which took place on November 29, 1993.

threats or compulsion, direct or indirect, to [him] *or any other person.*" (*See* Application to Enter a Guilty Plea ¶ 25; Plea Agreement ¶ 10.)

Moreover, prior to accepting the defendant's change of plea, the Court conducted an lengthy voir dire of the defendant pursuant to Federal Rule of Criminal Procedure 11 to confirm that his change of plea was completely voluntary and proper. During that voir dire, the Court specifically asked defendant whether his guilty plea was in any way coerced; the defendant responded it was not:

> THE COURT: Has anyone threatened you in any way to make or force you to enter a guilty plea?
>
> DEFENDANT: No, they haven't, your honor.
>
> THE COURT: Are you pleading guilty to protect anyone?
>
> DEFENDANT: No, I am not.

(Reporter's Transcript at 17:2-7.) The Court is entitled to credit defendant's testimony at the Rule 11 hearing over his subsequent testimony. *See Castello*, 724 F.2d at 815.

In an attempt to discount his prior admissions of guilt to the Court, defendant testified at the evidentiary hearing that he lied to the Court at the Rule 11 hearing because his wife "begged" him to plead guilty. As for explaining his statements in the Plea Agreement and the Application to Enter a Guilty Plea, defendant claims he did not read those documents and that he would have signed anything presented to him

by the Government.[7] Because the Court finds that the defendant lacks any semblance of credibility, the Court places no weight in these explanations. Accordingly, based on the totality of the circumstances, the Court finds that the defendant entered his guilty plea knowingly, voluntarily and intelligently.

C. *There Was No Error at the Rule 11 Hearing*

At the evidentiary hearing, defendant raised an issue concerning the propriety of the Court's Rule 11 voir dire. Specifically, he claimed that because the Plea Agreement was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(B), the Court erred in not advising him that he had no right to withdraw his guilty plea.

Rule 11(e) sets forth the appropriate procedure for plea agreements. Under Rule 11(e)(1), the government may do any of the following in exchange for a plea of guilty or nolo contendere:

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

[7] At the evidentiary hearing, defendant admitted that he was untruthful with the Court at the time he entered his guilty plea. Defendant claimed that his dishonesty was justified because, from his perspective, everyone "lies" in these types of proceedings, including the Court and the prosecutor. The Court finds that defendant's cavalier explanation exemplifies his disturbing and blatant disregard for the truth and evidences a complete lack of credibility.

> (C) agree that a specific sentence is the appropriate disposition of the case.

Fed. R. Crim. P. 11(e)(1)(A)-(C). Rule 11(e)(2) provides that "[i]f the agreement is of the type specified in subdivision (e)(1)(B), the Court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea."

The instant Plea Agreement indicates that it is pursuant to Rule 11(e)(1)(B). However, counsel for the Government explained at the hearing that this was a typographical error, and that the Agreement should have indicated Rule 11(e)(1)(A). The Court has reviewed the Plea Agreement and concurs with the Government. At paragraph 1 of the Plea Agreement, the Government expressly agreed to dismiss Count V through VIII of the Indictment in exchange for his guilty plea as to Counts I through IV. The Government also agreed that it would not bring any additional charges against the defendant based on his operation of or involvement in certain other fraudulent activities. (Plea Agreement ¶ 3.) There are no promises by the government in the Plea Agreement that it would make a recommendation, or agree not to oppose the defendant's request, for a particular sentence. Thus, the Court concludes that defendant's claim of error as a basis for withdrawing his guilty plea is without merit.

CONCLUSION

The record before the Court is devoid of any suggestion that defendant's guilty plea was in anyway coerced. Defendant's claim of coercion is nothing more than an attempt to avoid the consequences of his criminal conduct. Accordingly,

IT IS HEREBY ORDERED THAT:

(1) Defendant's motion to withdraw his guilty plea is DENIED.

(2) Defendant's Judgment and Sentencing shall take on **October 4, 1994**, at 1:30 p.m., in Courtroom 2 of the United States Courthouse, 450 Golden Gate Avenue, 17th Floor, San Francisco, California, 94102.

IT IS SO ORDERED.

DATED: July 18, 1994

/s/ SAUNDRA BROWN ARMSTRONG
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX D

STATUTORY PROVISIONS AND RULES

1. Rule 11 of the Federal Rules of Criminal Procedure provides:

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided

by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on

the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea disussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo

contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

2. Rule 32 of the Federal Rules of Criminal Procedure provides, in pertinent part:

(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

3. Sentencing Guidelines § 6B1.1 provides, in pertinent part:

§ 6B1.1. PLEA AGREEMENT PROCEDURE (POLICY STATEMENT)

(a) If the parties have reached a plea agreement, the court shall, on the record, require disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to

accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.

Commentary

This provision parallels the procedural requirements of Rule 11(e), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by § 6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has

had an opportunity to consider the presentence report.

No. 96-667

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
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QUESTION PRESENTED

Whether a defendant has an absolute right to withdraw his guilty plea after the district court has accepted it but before the district court has decided whether to accept or reject an accompanying plea agreement.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-5a) is reported at 82 F.3d 319. The order of the court of appeals (Pet. App. 6a-7a) amending the opinion and denying a petition for rehearing is reported at 92 F.3d 779. The order of the district court denying respondent's motion to withdraw his guilty plea (Pet. App. 8a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1996. A petition for rehearing was denied on July 29, 1996. Pet. App. 6a-7a. The petition for a writ of certiorari was filed on October 28, 1996, and was granted on January 17, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES AND GUIDELINES PROVISIONS INVOLVED

Rules 11 and 32 of the Federal Rules of Criminal Procedure and Sentencing Guidelines Section 6B1.1 are reproduced at App., *infra*, 1a-14a.

STATEMENT

1. On December 13, 1991, a grand jury in the Northern District of California returned an indictment (J.A. 5-13) charging respondent as principal and as accessory with three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of wire fraud, in violation of 18 U.S.C. 1343; and two counts of receiving stolen property, in violation of 18 U.S.C. 2315. The charges arose from a bogus loan brokerage scheme, under which respondent would allegedly promise to obtain loans on behalf of his victims, in return for their payment of up-front application fees. Although the victims paid the fees, respondent allegedly failed to arrange for the loans. Pet. App. 9a.

2. On November 29, 1993, the date set for the commencement of trial, respondent and the government entered into a written plea agreement. J.A. 21-27. That agreement provided that respondent would plead guilty to two of the mail fraud counts and to the two counts charging receipt of stolen property. J.A. 21. The agreement also provided that the government would move to dismiss the remaining four counts with which respondent was charged, *ibid.*, and would not bring further charges based on respondent's participation in the loan brokerage scheme or based on certain other past activities of respondent, J.A. 22-23. Finally, the agreement stated that respondent and the government agreed on a number of details concerning the application of the Sentencing Guidelines to this case and the calculation of the amount of restitution

that should be ordered. J.A. 23-24. The agreement recognized, however, that "[t]he district court will be free to make its own determinations pursuant to the Guidelines" and it stated that "[t]he defendant understands that the final decision as to which Guidelines apply rests with the court." J.A. 25.

That same afternoon, respondent pleaded guilty in open court to the four counts specified in the plea agreement. See J.A. 28-55. In conducting the colloquy required by Federal Rule of Criminal Procedure 11 for the taking of a guilty plea, the court addressed respondent and ascertained that respondent knew the nature of the charges and possible punishment, that respondent was willing to waive his various trial rights by virtue of his guilty plea, and that respondent's plea was knowing and voluntary. J.A. 34-52. The court also ascertained that respondent understood the plea agreement, the obligations it imposed on each party, and the continuing final authority of the court to determine an appropriate sentence in accord with the Sentencing Guidelines. J.A. 40-42.

Of particular relevance to this case, the court informed respondent that "I may accept or reject [the plea] agreement today, or I may reserve ruling to accept or reject the plea agreement pending completion of the presentence report." J.A. 41. The court asked respondent to state in his own words what he had done that led him to plead guilty to each of the four counts. The court also asked the government to set forth the factual basis for each charge, and the court confirmed that respondent agreed with the government's statements about the offenses. J.A. 42-50. The court asked respondent whether he had

committed the crimes charged, and respondent replied "Yes, Your Honor, I did." J.A. 51.

The court then reviewed the maximum sentences that could be imposed, J.A. 51-52, and the court ascertained that respondent had no objection to the advice he had received from his advisory counsel, J.A. 53. Finally, the court inquired how respondent pleaded to each of the four counts. With respect to each count, respondent answered, "Guilty, Your Honor." J.A. 53-54. The district court said, "The Court accepts the guilty plea." J.A. 54. The court also stated that it "reserves ruling on whether to accept the plea agreement pending completion of the presentence report." *Ibid.* The court filed a written order providing "that [respondent's] plea of 'GUILTY' be accepted." J.A. 20.

3. On December 23, 1993, respondent filed a motion pursuant to Federal Rule of Criminal Procedure 32(e) to withdraw his guilty plea on grounds of duress, claiming that the prosecutor and other Department of Justice officials had threatened harm to his wife. J.A. 56-57.[1] There followed a series of proceedings, including a hearing at which respondent failed to present evidence supporting his claim, see Pet. App. 10a; J.A. 58-61; respondent's submission of a "vague

[1] The caption of the motion indicated that it was filed "pursuant to F.R.C.P. Rule 32(d)." See J.A. 56. In January 1994, when respondent's motion was filed, the rule governing withdrawal of guilty pleas was codified as Rule 32(d). It was recodified as Rule 32(e) when Rule 32 was amended in 1994. Both before and after that change in designation, the rule provided in relevant part: "If a motion to withdraw a plea of guilty * * * is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason."

and conclusory" unsigned, unsworn statement by respondent's wife, see Pet. App. 11a; and an evidentiary hearing at which respondent introduced the testimony of his wife and daughter, and the government introduced the testimony of the FBI agent who was alleged to have threatened respondent's wife, see Pet. App. 12a; J.A. 62-65.

On July 19, 1994, the court issued a memorandum and order denying respondent's motion to withdraw his plea. Pet. App. 8a-18a. The court noted that, under Federal Rule of Criminal Procedure 32, a defendant may withdraw a guilty plea before sentencing "upon a showing by the defendant of any fair and just reason." See Pet. App. 12a. In this case, the court held, "[t]here is absolutely no credible evidence to support [respondent's] claim" of duress. *Id.* at 13a. The court also found that "[t]here is * * * no evidence that [the FBI agent] improperly threatened or coerced [respondent's wife]." *Id.* at 14a. Finding that "[respondent] lacks any semblance of credibility," *id.* at 16a, the court ruled "that [respondent] entered his guilty plea knowingly, voluntarily and intelligently." *Ibid.* The court also rejected respondent's claim that the court had committed error under Rule 11 at the guilty plea hearing. *Id.* at 16a-17a.

The court subsequently sentenced respondent to 30 months' imprisonment, to be followed by three years' supervised release, and ordered that he make restitution in the amount of approximately $477,990. J.A. 75-80.

4. The court of appeals reversed. The court held that the requirement of Federal Rule of Criminal Procedure 32(e) of a "fair and just reason" for withdrawing a plea of guilty was inapplicable in this case.

The court observed that "when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the court must permit the withdrawal." Pet. App. 2a. The court noted respondent first moved to withdraw the plea almost a month after the court had accepted it, but concluded that that fact was irrelevant, because the district court had not yet accepted the plea agreement. The court explained that

> [t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated that it accepted [the] plea.

Id. at 3a (quoting *United States* v. *Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, 117 S. Ct. 113 (1996)). The court concluded that

> [i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire.

Pet. App. 4a. The court therefore reversed respondent's conviction "so that he can plead anew." *Ibid.*

Judge Ferguson filed a brief concurring opinion (Pet. App. 5a), in which he stated that while he disagreed with the result, he believed that it followed from the Ninth Circuit's decision in *United States* v. *Cordova-Perez*.

SUMMARY OF ARGUMENT

Under the Federal Rules of Criminal Procedure, a guilty plea must be tendered personally by a defendant in open court and a court must follow careful procedures before deciding whether to accept the guilty plea. Once the district court has accepted a guilty plea, the Rules contain two provisions governing withdrawal of the plea before sentencing. Under Rule 32(e), a defendant may withdraw a guilty plea on a showing of a "fair and just reason." Under Rule 11(e)(4), a defendant has an absolute option to withdraw a guilty plea if the district court has rejected an accompanying plea agreement. The district court in this case correctly found that respondent's request to withdraw his guilty plea satisfied neither of those standards; respondent proffered no "fair and just reason," and the district court had not rejected the plea agreement.

The Ninth Circuit did not disagree with the district court's findings that respondent failed to satisfy the standards of Rule 32(e) and Rule 11(e)(4). The court's determination that respondent should nonetheless be permitted freely to withdraw his guilty plea—"for any reason or for no reason"—therefore conflicts with the explicit provisions, as well as the underlying policies, of both Rules.

The court of appeals attempted to justify its rule of free withdrawal from guilty pleas on the ground that such a rule is justified where the district court has never really accepted the plea in the first place. In the Ninth Circuit's view, the district court's apparent acceptance of the guilty plea in this case must be disregarded because the district court at the same

time deferred decision on whether to accept the accompanying plea agreement.

There is no legal basis for the court of appeals' holding that a district court's acceptance of a guilty plea must be disregarded until such time as the district court has accepted an accompanying plea agreement. The Federal Rules nowhere condition the court's acceptance of a guilty plea on its acceptance of an accompanying plea agreement. Rather, the Rules expressly provide that courts may accept guilty pleas when tendered while deferring decision on whether to accept or reject an accompanying plea agreement. A court may not disregard the Rules on the ground of a perceived injustice, but, in any event, there is nothing unjust about holding a defendant to his guilty plea in the absence of a "fair and just reason."

The Ninth Circuit's rule of free withdrawal would encourage gamesmanship by defendants seeking to delay their trial. In addition, by converting a defendant's confession to a crime and guilty plea into a statement revocable at will for a period of months after it has been tendered and accepted in open court, the court of appeals' rule reduces respect for judicial proceedings and for the rule of law.

ARGUMENT

A DEFENDANT HAS NO RIGHT TO WITHDRAW A GUILTY PLEA AFTER THE DISTRICT COURT HAS ACCEPTED IT ABSENT THE SHOWING OF A FAIR AND JUST REASON OR THE REJECTION OF AN ACCOMPANYING PLEA AGREEMENT

The Ninth Circuit held that a defendant who has pleaded guilty to a crime, but who has also entered into a plea agreement, may withdraw his guilty plea for any reason—or for no reason at all—at any time

before the court's acceptance of the plea agreement. In most circumstances, district courts postpone a decision whether to accept a plea agreement until a presentence report has been prepared and the court has had the opportunity to review it. Accordingly, under the Ninth Circuit's ruling, a knowing and voluntary guilty plea made with full procedural safeguards and due formality in open court amounts merely to a statement by the defendant that he may or may not have committed the crime and that he may or may not demand a trial on the charges against him; the guilty plea has no binding effect whatsoever for a prolonged period, until a presentence report has been prepared, objections have been made, and the court has determined whether to accept the plea agreement.

The Ninth Circuit's rule is contrary to express provisions of the Federal Rules of Criminal Procedure, and it threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases. Accordingly, it should be reversed.

A. The Federal Rules of Criminal Procedure Narrowly Limit The Circumstances Under Which A Guilty Plea, Once Accepted By A Court, May Be Withdrawn

1. Rule 11 of the Federal Rules of Criminal Procedure contains a set of detailed requirements that must accompany the entry and acceptance of a guilty plea. The rule provides that, "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," a number of crucial facts. Fed. R. Crim. P. 11(c). Those include the nature of the charge, the

maximum and minimum penalties to which the defendant will be subject, and the defendant's rights to representation by an attorney at every stage of the proceeding, to trial by jury, to confront and cross-examine witnesses, and to the privilege against compelled self-incrimination. *Ibid.* The court must also ensure, "by addressing the defendant personally in open court," that the defendant's plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d). In addition, the court "should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f).

Rule 11's detailed procedures for entering a valid guilty plea reflect the fact "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). As *Brady* explained, "[c]entral to the plea * * * is the defendant's admission in open court that he committed the acts charged in the indictment." *Ibid.* The procedures required for entry and acceptance of a guilty plea are therefore designed to ensure that the defendant knows precisely the significance and consequences of making that admission. Where the proper procedures are followed and where the defendant has publicly admitted to having committed the offense charged, the defendant's admission is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975).

2. Rule 11 also provides for plea agreements and for their acceptance. Such agreements may contain

promises that the government will take three sorts of actions:

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.

Fed. R. Crim. P. 11(e)(1). The Rule differentiates the treatment of plea agreements that provide for the dismissal of charges or the imposition of a specific sentence (agreements under subdivisions (A) and (C) above) from plea agreements that provide only for nonbinding recommendations as to the sentence (agreements under subdivision (B) above). The Rule also specifies what options are available to a defendant if a court, after having accepted a guilty plea, later rejects an accompanying charge-dismissal or specific-sentence agreement.

a. Rule 11 expressly provides for the district court to defer its decision whether to accept a Rule 11(e)(1)(A) or Rule 11(e)(1)(C) plea agreement—*i.e.*, an agreement providing for dismissal of charges or imposition of a specific sentence. In the case of such agreements, "the court may accept or reject the agreement, *or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.*" Fed. R. Crim. P. 11(e)(2) (emphasis added). The primary purpose of permitting such deferral is to allow time for the preparation of a presentence report and its review

by the district court. The court may thereby review the detailed factual information ordinarily included in the presentence report and ensure that the dismissal of the charges or the imposition of a particular sentence in accordance with the agreement is consistent with the public interest in the just disposition of criminal charges. The Sentencing Guidelines generally require the district court to defer its decision on a charge-dismissal or specific-sentence plea agreement. See Sentencing Guidelines § 6B1.1(c) ("The court shall defer its decision * * * to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report.").[2] That requirement enables the court to ensure that such a plea agreement contemplates appropriate treatment of the defendant under the Guidelines, so that the agreement does not impair the Guidelines' purpose of preventing unwarranted disparities in sentencing. See, *e.g.*, 28 U.S.C. 994(f); *Mistretta* v. *United States*, 488 U.S. 361, 366-367 (1989).

Rule 11 also states what happens when the court accepts or rejects a charge-dismissal or a specific-sentence agreement. Under Rule 11(e)(3), "[i]f the

[2] Sentencing Guidelines Section 6B1.1(c) provides an exception for cases where "a [presentence] report is not required under § 6A1.1." Sentencing Guidelines Section 6A1.1 in turn provides that "[a] probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record." Under this provision, presentence reports are required in the vast majority of federal criminal cases.

court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." On the other hand, under Rule 11(e)(4), "[i]f the court rejects the plea agreement, the court shall * * * inform the parties * * * that the court is not bound by the plea agreement [and] afford the defendant the opportunity to then withdraw the plea." The Rule adds that the court must "advise the defendant that if the defendant persists in a guilty plea * * * the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." *Ibid.* Thus, once a court rejects an agreement on which the defendant relied in pleading guilty, the defendant may—based on his own assessment of the risks and benefits—either adhere to the plea or withdraw from it and go to trial. See *United States* v. *Ellison*, 798 F.2d 1102, 1105 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987).[3]

[3] The Rules treat plea agreements that provide only for nonbinding recommendations concerning what sentence to impose—agreements made under Rule 11(e)(1)(B)—differently from agreements providing for dismissal of charges or imposition of a definite sentence. In the case of such a recommended-sentence agreement, the parties have expressly agreed "that such recommendation or request shall not be binding upon the court." Fed. R. Crim. P. 11(e)(1)(B). Because the agreement does not purport to commit the court to taking any particular action, a court would have no reason to reject such an agreement—though it may of course choose not to follow the nonbinding sentencing recommendation embodied in the agreement. Nor would the defendant be able to claim that he relied on imposition of any particular sentence in entering into the agreement and tendering his guilty plea. Accordingly, the Rules provide that in the case of such an agreement, "the court shall advise the defendant that if the court does not accept the

3. Rule 11(e)(4)'s provision for withdrawal of a guilty plea at the defendant's option when the court rejects an accompanying plea agreement states the only circumstance in which the defendant may unilaterally withdraw a plea. Any other request to withdraw an accepted plea must satisfy the requirements of Rule 32(e). That Rule provides: "If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Fed. R. Crim. P. 32(e). See also *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927) (pre-Rules use of "fair and just reason" standard).

Rule 32(e) grants a district court limited authority to permit withdrawals of a guilty plea at any time "before sentence is imposed." Fed. R. Crim. P. 32(e). It "does not provide an absolute right to withdraw a plea"; rather "[t]he defendant has the burden of proving that withdrawal is justified." *United States* v. *Moore*, 37 F.3d 169, 172 (5th Cir. 1994); see, *e.g.*, *United States* v. *Boone*, 869 F.2d 1089, 1091 (8th Cir.), cert. denied, 493 U.S. 822 (1989); *Government of Virgin Islands* v. *Berry*, 631 F.2d 214, 219-220 (3d Cir. 1980) (earlier version of Rule 32(e)); see also Amendments to Rules, 97 F.R.D. 245, 312 (1983). The defendant's withdrawal "must rest on something more than the defendant's second thoughts about some fact or point of law, or about the wisdom of his earlier decision." *United States* v. *Parrilla-Tirado*, 22 F.3d 368, 371 (1st Cir. 1994) (citations omitted).

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recommendation or request [as to sentencing] the defendant nevertheless has no right to withdraw the plea." Fed. R. Crim. P. 11(e)(2).

Where the defendant has made a showing sufficient to satisfy that standard, however, relief from the guilty plea is authorized. See, *e.g.*, *United States* v. *Martinez-Molina*, 64 F.3d 719, 733-734 (1st Cir. 1995); *United States* v. *Groll*, 992 F.2d 755 (7th Cir. 1993); *United States* v. *Syal*, 963 F.2d 900 (6th Cir. 1992). Otherwise, a duly accepted guilty plea should stand.

B. The Ninth Circuit's Rule Permitting Respondent To Withdraw His Guilty Plea "For Any Reason Or For No Reason" Is Inconsistent With Rules 11 and 32

The Ninth Circuit's rule permitting a defendant freely to withdraw a guilty plea at any time before the court accepts an accompanying plea agreement is inconsistent with the carefully drafted provisions of the Federal Rules of Criminal Procedure set forth above. Under those provisions, "once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea only in two ways relevant here, either by showing a fair and just reason under Rule 32[(e)], or by withdrawing under Rule 11(e)(4) after a rejected plea agreement." *United States* v. *Ewing*, 957 F.2d 115, 119 (4th Cir.), cert. denied, 505 U.S. 1210 (1992); see also *Ellison*, 798 F.2d at 1104-1105. Because respondent did not "show[] a fair and just reason" and the district court did not reject the plea agreement, the Ninth Circuit erred in holding that respondent may simply repudiate his guilty plea.

The Ninth Circuit attempted to justify its rule based on two propositions. First, the court stated that a defendant is free to withdraw his guilty plea before the district court has accepted it. Second, the court stated that "[t]he plea agreement and the plea are 'inextricably bound up together' such that the

deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea." Pet. App. 3a. Putting those two propositions together, the court of appeals concluded that a defendant is free to withdraw his guilty plea until the district court has accepted the plea agreement.

We assume for present purposes that the court of appeals' first premise is correct: Until the district court accepts a guilty plea, the defendant is free to withdraw it. See *United States* v. *Washman*, 66 F.3d 210, 212-213 (9th Cir. 1995). The court of appeals clearly erred, however, in holding that, when a district court defers a decision regarding whether to accept a plea agreement, it necessarily also defers a decision regarding whether to accept a guilty plea. That holding is without foundation and threatens to inject instability into the resolution of criminal cases through guilty pleas.

1. The court of appeals' holding that the district court necessarily deferred its decision whether to accept respondent's guilty plea when it deferred decision on the plea agreement is directly contrary to what the district court actually did. At the guilty plea hearing on November 29, 1993, the district court complied with all of the requirements of Rule 11. At the completion of the colloquy with respondent, the court stated: "*The court accepts the guilty plea.* The court reserves ruling on whether to accept the plea agreement pending completion of the presentence report." J.A. 54 (emphasis added). Moreover, on the same day, the court filed a written "Order Accepting Guilty Plea." J.A. 20. The Order recited that respondent had entered his plea "freely and voluntarily," that respondent "understands and knowingly * * *

waives his/her Constitutional rights," that respondent "freely and voluntarily" applied to enter a guilty plea, and that respondent "has admitted the essential elements of the crime charged." *Ibid.* The Order then stated: "IT IS THEREFORE ORDERED that [respondent's] plea of 'GUILTY' be accepted and entered as prayed for." *Ibid.* On this record, there is no room for ambiguity regarding the district court's acceptance of respondent's guilty plea.[4]

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[4] The plea agreement in this case recited that it was being entered into pursuant to Rule 11(e)(1)(B). See J.A. 21. That, however, appears to have been an error. Although the agreement did contain certain provisions regarding how the parties believed that the Guidelines should be applied in this case, J.A. 23-24, the agreement did not contain a recommendation regarding the ultimate sentence to be imposed, which is the hallmark of a Rule 11(e)(1)(B) agreement. And because the agreement did provide for the government to dismiss certain charges, it was appropriately viewed as a Rule 11(e)(1)(A) agreement. See J.A. 21; see also Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1979 Amendments. Noting these characteristics of the agreement, the district court at the plea hearing stated that it should be classified as a Rule 11(e)(1)(A) agreement. J.A. 41. The government agreed, without objection from respondent. *Ibid.*

Even if the district court erred in classifying the plea agreement under Rule 11(e)(1)(A), that would be of no consequence in this case. The only difference in the treatment of a charge-dismissal agreement under Rule 11(e)(1)(A) and a recommended-sentence agreement under Rule 11(e)(1)(B) is that, if the court rejects a charge-dismissal agreement, the defendant may freely withdraw his plea of guilty, while the defendant has no such right to withdraw his plea after entering into a Rule 11(e)(1)(B) agreement. Because the district court did not reject any portion of the plea agreement in this case, the classification of the agreement could have made no difference regarding respondent's right to withdraw his guilty plea.

2. The court of appeals did not maintain that the district court had actually deferred its acceptance of respondent's guilty plea. Rather, the court of appeals adopted a counterfactual principle of law that posits that whenever a district court postpones acceptance of a plea agreement, it necessarily defers its decision whether to accept the underlying guilty plea. See Pet. App. 3a. That principle, however, is entirely unfounded.

First, as noted above, there is nothing in the Federal Rules of Criminal Procedure that prohibits a district court from accepting a guilty plea before the district court has decided whether to accept a plea agreement. Rule 11 does impose certain requirements on the district court before it may accept a guilty plea. It provides that, "*[b]efore accepting a plea of guilty* * * *, the court must address the defendant personally in open court" and determine that the defendant understands the facts, the law, and the rights he is waiving. Fed. R. Crim. P. 11(c) (emphasis added). The Rule also provides that "*[t]he court shall not accept a plea of guilty* * * * *without first* * * * *determining* that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d) (emphasis added). The Rule also specifically envisions that the absence of a factual basis does not vitiate the district court's ability to accept a plea, though it does preclude the district court from entering judgment on it. See Fed. R. Crim. P. 11(f) ("*Notwithstanding the acceptance of a plea of guilty*, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.") (emphasis added). And a separate subdivision of Rule 11 governs

plea agreement procedure, with the express provision that a court may defer its acceptance or rejection of the plea *agreement* pending consideration of the presentence report. Fed. R. Crim. P. 11(e)(2). There is no parallel provision in Rule 11 requiring simultaneous deferral of acceptance or rejection of the *guilty plea*.

Rule 11 therefore carefully sets forth what is (and, in one instance, what is not) required before a court may validly accept a guilty plea. None of those provisions prohibits a court from accepting a guilty plea until it also accepts an accompanying plea agreement. Nor can any of those provisions reasonably be read to imply such a prohibition. Indeed, the provision of Rule 11(e)(4) granting a defendant an express right freely to withdraw a guilty plea if the court rejects an accompanying plea agreement would make little sense unless it is assumed that, at the time the court rejects the plea agreement, the defendant would be otherwise bound by a guilty plea that had already been properly accepted by the court.

Second, a court may not disregard the Federal Rules of Criminal Procedure even if the court believes they lead to an unfair or unjust result. See *Carlisle* v. *United States*, 116 S. Ct. 1460, 1466 (1996) (court may not "develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure"); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). But, in any event, the provisions at issue in this case are fair and reasonable. No defendant is required to plead guilty. Rule 32(e) in plain terms informs all participants that a guilty plea, once accepted by the court, may be withdrawn before sentencing only on a showing of a "fair and just reason." Consequently, if a defendant confesses to

his crime in open court at his plea proceeding, there is no injustice in holding the defendant to the consequences of his action. Indeed, the Rules' emphasis on the binding nature of the guilty plea has the salutary effect of reminding the defendant that a guilty plea should not be entered into lightly with the expectation that it may be retracted if and when the defendant has second thoughts. By contrast, the rule of free withdrawal from a guilty plea adopted by the Ninth Circuit would encourage an uncommitted defendant to enter a guilty plea and convince a district court to accept it, secure in the knowledge that the defendant will have a substantial period of time to repudiate his decision with no risk or cost.

Third, the only rationale for adopting a rule that a court may not accept a guilty plea until it has accepted an accompanying plea agreement would be the view that a defendant should have the opportunity to review the presentence report—and thereby gain a preview into his likely sentence—before finally committing himself to his plea. But that rationale has been squarely rejected by the Federal Rules in cases where the defendant has been unable to obtain a Rule 11(e)(1)(C) specific-sentence plea agreements. See *United States* v. *Horne*, 987 F.2d 833, 838 (D.C. Cir.), cert. denied, 510 U.S. 852 (1993); *United States* v. *Ludwig*, 972 F.2d 948, 951 (8th Cir. 1992); *United States* v. *Jackson*, 983 F.2d 757, 770 (7th Cir. 1993). All defendants who want to plead guilty must first be informed of the maximum possible sentence they face if their plea is accepted. See Fed. R. Crim. P. 11(c)(1). If a defendant who has obtained only a charge-dismissal agreement is willing to plead guilty knowing that that maximum sentence may be imposed, any sentence less than or equal to the

maximum can give him no reasonable ground for complaint.

3. Quite apart from the fact that the Ninth Circuit's rule conflicts with the Federal Rules of Criminal Procedure, precluding a court from accepting a guilty plea before the court has decided whether to accept a plea agreement would have serious adverse practical consequences. That rule encourages defendants to engage in manipulation and gamesmanship. For example, a defendant may delay a trial several months or longer—and put the government and the court to the substantial expense of needless trial preparation and needless preparation and review of a presentence report—simply by entering into a plea agreement and guilty plea on the eve of trial and then withdrawing his plea just before sentencing. Procedural rules should not be framed to permit that sort of manipulation.

The gap in Rule 32(e) opened by the Ninth Circuit's rule is a large one. Rule 32(e)'s "fair and just reason" standard applies "before sentence is imposed"—*i.e.*, during the time between the entry of a guilty plea and the time sentence is imposed. The Ninth Circuit's competing rule of free withdrawal would, however, apply to any case in which (a) the court has accepted a guilty plea at the Rule 11 plea proceeding, and (b) the court has deferred accepting an accompanying plea agreement until it has had the opportunity to review the presentence report.[5] District courts generally

[5] The vast majority of pleas of guilty in federal court are accompanied by plea agreements. See Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1974 Amendments ("guilty pleas account for the disposition of as many as 95% of all criminal cases," and "[a] substantial number of these are the result of plea discussions"); see also *Blackledge* v. *Allison*, 431

accept guilty pleas at the Rule 11 proceeding, so that preparation of the presentence report may be commenced and preparation for trial ended. And, as discussed above, see pp. 12-13, *supra*, courts ordinarily defer decision on whether to accept the plea agreement until they can review the presentence report.[6] Thus, the net effect of the Ninth Circuit's rule would be to displace Rule 32(e)'s "fair and just

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U.S. 63, 71 (1977) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system"); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions * * * leads to prompt and largely final disposition of most criminal cases.").

[6] Under Federal Rule of Criminal Procedure 32(b)(6)(C), the presentence report must be submitted to the court for its review "not later than 7 days before the sentencing hearing." Before that time, the probation office must gather detailed "information about the defendant's history and characteristics, including any prior criminal record, financial, condition, and any circumstances that * * * may be helpful in imposing sentence" and "an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed." Fed. R. Crim. P. 32(b)(4)(A) and (D). In addition, the presentence report must ordinarily be furnished to the defendant and the government not later than 35 days before the sentencing hearing, Fed. R. Crim. P. 32(b)(6)(A), the parties must make whatever objections they have to the report not later than 14 days before the sentencing hearing, Fed. R. Crim. P. 32(b)(6)(B), and the probation officer must then conduct any further investigation and prepare whatever addenda to the report are appropriate, Fed. R. Crim. P. 32(b)(6)(B). Accordingly, there is often a substantial period between the time the defendant pleads guilty and the time when the presentence report is furnished to the court, and the court frequently is in a position to review the presentence report and determine whether to accept the plea agreement only at or very near the time of sentencing.

reason" standard in most cases from the time of entry of the guilty plea until the presentence report is prepared, at or near sentencing—*i.e.*, in most cases during virtually the entire period of time in which the "fair and just reason" standard was intended to be operative.

In addition, the court of appeals' decision reduces respect for judicial proceedings. It converts the defendant's solemn confession of guilt, made in open court during a guilty plea proceeding, into a statement that is revocable at will and that in most cases will have no legal effect unless and until the defendant later decides that it is advantageous to adhere to it. As the Advisory Committee commented when it added the "fair and just reason" standard to Rule 32(e), "[g]iven the great care with which pleas are taken under th[e] revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence." 97 F.R.D. at 313.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1997

APPENDIX

STATUTORY PROVISIONS AND RULES

1. Rule 11 of the Federal Rules of Criminal Procedure provides:

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided

by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on

the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea disussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo

contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

2. Rule 32 of the Federal Rules of Criminal Procedure provides:

Rule 32. Sentence and Judgment

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) When Made. The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

(2) Presentence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) Contents of the Presentence Report. The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer 's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(G) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer

not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence

(1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) Production of Statements at Sentencing Hearing. Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) Imposition of Sentence. Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(d) Judgment

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered according. The judgment must be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the

interest or property subject to forfeiture on terms that the court consider proper.

(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule—

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocation under subdivision (c)(3)(E) may be exercised instead by—

(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

(B) One or more family members or relatives designated by the court if the victim is deceased or incapacitated;
if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use of attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.

3. Sentencing Guidelines § 6B1.1 provides, in pertinent part:

§ 6B1.1. PLEA AGREEMENT PROCEDURE (POLICY STATEMENT)

(a) If the parties have reached a plea agreement, the court shall, on the record, require

disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.

Commentary

This provision parallels the procedural requirements of Rule 11(e), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to

accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by § 6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report.

(3)

No. 96-667

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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Respondent acknowledges that the circuits are divided on the question presented by the petition—whether a defendant whose guilty plea has been accepted by a district court retains an absolute right to withdraw that plea at any time before the district court has decided whether to accept or reject an accompanying plea agreement. Br. in Opp. 12. He contends, however, that the Court should deny review because, in his view, the conflict would better be resolved by amendments to the Sentencing Guidelines or Federal Rules of Criminal Procedure (*id.* at 7-11); there is no concrete evidence on how often criminal defendants seek to withdraw guilty pleas before a district court decides whether to accept the plea agreement (*id.* at 12-14); and only three circuits have

considered the issue. Respondent also argues that the decision below does not conflict with the scheme for accepting and withdrawing guilty pleas under the Federal Rules of Criminal Procedure. None of those contentions has merit.

1. Respondent contends that the drafters of the Federal Rules of Criminal Procedure or Sentencing Guidelines could ameliorate the circuit conflict raised in this case. Br. in Opp. 7-11. That claim provides no basis for denying review here.

The Sentencing Commission could not resolve the issue before this Court. The issue in this case is whether the court of appeals' holding violates the Federal Rules of Criminal Procedure. The Sentencing Commission has no power to alter that holding. It is true that the Sentencing Commission has issued a policy statement generally requiring a court to "defer its * * * decision to accept or reject any plea agreement pursuant to [Federal] Rules [of Criminal Procedure] 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report." Guidelines § 6B1.1(c). In practice, that procedure means that there will usually be a significant gap in time between the court's taking of a guilty plea under Rule 11 and its ultimate decision whether to accept or reject the plea agreement. But the Sentencing Commission could not mandate that that gap be closed. Rule 11(e)(2) of the Federal Rules of Criminal Procedure gives sentencing courts the discretion to defer acceptance of the plea agreement "until there has been an opportunity to consider the presentence report." Fed. R. Crim. P. 11(e)(2). The Commission could not prevent a district court from taking the sensible course, which the Rules allow, of deferring

consideration of the plea agreement until the court has reviewed the presentence report.

The drafters of the Federal Rules of Criminal Procedure could, of course, "resolve" the circuit conflict, either by providing (even more expressly than the Rules already do) that the court of appeals' holding is in error, or, alternatively, by changing the Rules to conform to the court of appeals' decision. Since the Rules already speak clearly to the issue in this case, see Pet. 8-10, it makes little sense to require an amendment of the Rules to repeat what the Rules already require. Moreover, the possibility of an amendment to the Rules exists in every case involving their construction. That possibility has not deterred this Court from resolving circuit conflicts that arise in the interpretation of the Rules. See, *e.g.*, *Libretti* v. *United States*, 116 S. Ct. 356, 362 & nn. 3-4 (1995) (granting certiorari to resolve conflicts over the interpretation of Fed. R. Crim. P. 11(f) and 31(e)); *Carlisle* v. *United States*, 116 S. Ct. 1460 (1996) (reviewing interpretation of Fed. R. Crim. P. 29(c)).*

In any event, changes to the Sentencing Guidelines or the Federal Rules of Criminal Procedure could

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* The Ninth Circuit's decision in this case was brought to the attention of the Advisory Committee on Federal Rules of Criminal Procedure at its meeting on October 7-8, 1996. According to draft minutes (at page 5), the "Committee * * * requested the Reporter to draft alternative versions of possible amendments to Rule 11(e)(4) which would deal with the [*United States* v. *Harris*, 70 F.3d 1001 (8th Cir. 1995)] and *Hyde* decisions." The draft language is to be submitted at the Committee's April 7-8, 1997, meeting. Draft Minutes at 5. We have lodged a copy of the draft minutes with the Court and served it on respondent. The draft minutes have not yet been approved by the Committee.

create problems that the current rules are designed to avoid. As the Sentencing Commission has explained, a district court should not accept a plea agreement calling for dismissal of charges under Rule 11(e)(1)(A) or calling for a specific sentence under Rule 11(e)(1)(C) unless the court is confident that the disposition will not undermine or unjustifiably depart from the Sentencing Guidelines. See Guidelines § 6B1.2 (commentary). A court would find it difficult to make that determination absent an opportunity to consult the presentence report. That is why the Guidelines require the court to defer its acceptance or rejection of a plea agreement until the presentence report is available. Rule 11 procedures, for their part, are designed to ensure the entry of a knowing and voluntary plea of guilty. It would denigrate those careful procedures to permit a guilty plea to be revocable at will for a substantial time after its entry. It would also create uncertainty for trial judges, prosecutors, witnesses, and victims.

Respondent suggests that the courts could alleviate some of those concerns by having a presentence report prepared before entry of the guilty plea. Br. in Opp. 9. That course, however, would require the Probation Office to devote resources to a presentence report before the court even knows whether the defendant will be found or will plead guilty; it would often require preparation of the report without the cooperation of the defendant (who still would have a full interest in asserting Fifth Amendment rights); and it would delay the resolution of the defendant's guilt or innocence (in tension with the provisions and purposes of the Speedy Trial Act). The drafters of the Rules wisely avoided mandating a practice that would have those adverse effects.

2. Respondent contends that the circuit conflict in this case is "neither deep nor engrained." Br. in Opp. 12. Three circuits, however, have addressed this issue, and two of them reached the opposite result from the Ninth Circuit in this case. See Pet. 11-12. The full Ninth Circuit denied the government's suggestion that this case be reheard en banc. Pet. App. 6a-7a. The conflict will thus persist absent this Court's review.

A decision that introduces such substantial instability into the plea negotiation process (see Pet. 12-16) in the largest circuit in the Nation warrants this Court's intervention. Respondent is correct that our petition does not cite statistics on how often guilty pleas are accompanied by plea agreements (Br. in Opp. 12), or on how often defendants seek to withdraw from pleas (*id.* at 13). In the experience of the Department of Justice, however, the vast majority of guilty pleas in federal court are accompanied by plea agreements, and defendants not infrequently seek to extricate themselves from guilty pleas based on post-plea changes of heart. (The many cases cited in United States Code Annotated interpreting the "fair and just reason" standard of Fed. R. Crim. P. 32(e) attest to the frequency with which defendants seek to withdraw guilty pleas.) A decision that renders Rules 11(e)(1)(A) and 11(e)(1)(C) plea agreements revocable at the will of the defendant for a significant period of time is an open invitation to the disruption of the orderly resolution of cases through guilty pleas.

3. Finally, respondent argues that the court of appeals' holding is correct. Br. in Opp. 14-18. In respondent's view, the court's holding rests on the "fact" that "deferment of acceptance of the plea agreement necessarily carries with it deferment of accep-

tance of the guilty plea." *Id.* at 15. As we explain in our petition (at 8-11), however, the Rules provide otherwise: a guilty plea, once accepted in accordance with Rules 11(c), (d), and (f), is valid and binding unless the defendant withdraws it *after* the district court has rejected a charge-dismissal or specific-sentence plea agreement (Rule 11(e)(4)) or unless the defendant shows a "fair and just reason" for withdrawal (Rule 32(e)). The automatic-withdrawal right posited by the court of appeals conflicts with that scheme.

Respondent errs in suggesting that the government has, as a general matter, agreed with the Ninth Circuit's holding in *United States* v. *Cordova-Perez*, 65 F.3d 1552 (1995), cert. denied, 117 S. Ct. 113 (1996), that "acceptance of a guilty plea is inherently conditional upon the later acceptance of the plea agreement." Br. in Opp. 16, quoting a portion of U.S. Br. in Opp. at 6 n.4, *Cordova-Perez* v. *United States*, cert. denied, 117 S. Ct. 113 (1996) (No. 95-9101). In *Cordova-Perez*, a plea agreement called for the government to dismiss a greater charge and for the defendant to plead guilty to a lesser-included charge. The district court accepted the plea, but later rejected the plea agreement. It then vacated the earlier-entered guilty plea to the lesser-included charge and ordered the case to trial on the greater charge. The Ninth Circuit affirmed, rejecting the defendant's claim that the court should not have permitted trial on the greater charge. The court of appeals reasoned that "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea," thus rendering the guilty plea "conditional." 65 F.3d at 1556.

Our brief in opposition to the defendant's petition for a writ of certiorari defended the judgment, but we did not endorse the court of appeals' analysis as a general matter. Rather, we said:

> As petitioner points out (Pet. 7), the court of appeals stated that the district court's acceptance of petitioner's guilty plea itself was "conditional," explaining that "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea." Pet. App. A, 1556. In practice, that is the logical consequence of a district court's determination to defer acceptance or rejection of a plea agreement that calls for the government to dismiss a charge on a greater offense. See Fed. R. Crim. P. 11(e)(1)(A). Normally, if a district court rejects a plea agreement under Rule 11(e)(1)(A) or (C), it must "afford the defendant the opportunity to then withdraw the plea." Fed. R. Crim. P. 11(e)(4). When a court rejects a plea agreement that would require the government to dismiss a charge on a greater offense, however, the court necessarily has determined not to accept the plea to the lesser offense. In such a case, the court's earlier acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement.

U.S. Br. in Opp. at 6 n.4, *Cordova-Perez* v. *United States*, *supra*. Thus, our statement that "*[i]n such a case*, the court's earlier acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement" was limited to the circumstances in *Cordova-Perez*, *i.e.*, a plea agreement that calls for the dismissal of a greater charge and a guilty plea to a

lesser charge. That is not the case here. The issue in this case is whether, *as a general rule in all guilty plea cases*, acceptance of a guilty plea should be deemed conditional whenever a court defers acceptance or rejection of a plea agreement. Our brief in *Cordova-Perez* did not address that issue.

Nonetheless, upon further reflection we have concluded that even the statement in our brief in opposition in *Cordova-Perez* was incorrect. Even where, as in *Cordova-Perez*, a defendant has pleaded guilty to a lesser-included offense and the court has rejected a plea agreement calling for dismissal of charges on the greater offense, our statement that "the court's earlier acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement" is mistaken. If the district court accepts a plea in unqualified terms at a plea proceeding, nothing in the Federal Rules requires the counter-factual description of the court's action as "conditional" upon the court's later acceptance of an accompanying plea agreement. The only effect of the court's rejection of the plea agreement is that the defendant then has the right under Rule 11(e)(4) to withdraw his guilty plea.

This alteration in our analysis has no effect on our views regarding the validity of the court of appeals' decision in *Cordova-Perez*. As we note in the petition in this case (at 10 n.1), the defendant in *Cordova-Perez* did not object to the court's requirement that he face trial on the lesser-included offense without offering him the choice of adhering to his guilty plea. The defendant instead attacked the right of the government to try him on the greater offense after the district court refused to accept the plea agreement. The court of appeals correctly rejected that argu-

ment. That conclusion, however, provides no support for the court of appeals' holding here that a defendant may exercise a general privilege to withdraw his guilty plea until such time as the court accepts an accompanying plea agreement. Because that later holding cannot be reconciled with the structure of the Federal Rules of Criminal Procedure, this Court's review is warranted.

* * * * *

For the forgoing reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

DECEMBER 1996

No. 96-667

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 28, 1996
CERTIORARI GRANTED JANUARY 17, 1997

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* The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the appendix to the petition for writ of certiorari and has not been reproduced here.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-10113

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT E. HYDE, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/10/95	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL AND APLT PRO SE.
4/8/96	ARGUED AND SUBMITTED TO Warren J. FERGUSON, Dorothy W. NELSON, Ferdinand F. FERNANDEZ [95-10113] (mlm)
4/30/96	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed and Remanded; Written, Signed, Published. Warren J. FERGUSON, concurring; Dorothy W. NELSON; Ferdinand F. FERNANDEZ, author.) FILED AND JUDGMENT. [95-10113] (dl)
7/29/96	Filed order and amended opinion (Judges Warren J. FERGUSON, Dorothy W. NELSON, Ferdinand F. FERNANDEZ, author) (Orig. opinion id: [2998234-1]) denying petition for enbanc rehearing [3027331-1] REVERSED & REMANDED [95-10113] (dg)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. Cr. 91-0672-SBA

UNITED STATES OF AMERICA, PLAINTIFF

v.

ELMER ROBERT HYDE, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
12/13/91	1	INDICTMENT by AUSA Joel Levin. Counts filed against Elmer Robert Hyde (1) count(s) 1, 2, 3, 4-5, 6-8 (rhw)
•	•	• • • •
11/29/93	104	MINUTES: before Judge Saundra B. Armstrong; Elmer Robert Hyde enters guilty plea; Elmer Robert Hyde (1) count(s) 1, 2-3, 4, sentencing hearing will be held at 1:30 p.m. on 2/8/94 as to defendant Elmer Robert Hyde (C/R: Diane Skillman) (rhw) [Entry date 11/30/93]
11/29/93	105	APPLICATION TO PLEAD GUILTY filed by Elmer Robert Hyde before Judge Saundra B. Armstrong (rhw)
11/29/93	106	PLEA Agreement as to Elmer Robert Hyde (rhw) [Entry date 11/30/93]
•	•	• • • •

DATE		PROCEEDINGS
1/10/94	115	MOTION before Judge Saundra B. Armstrong to withdraw guilty plea given under "choice of evil" duress by defendant Elmer Robert Hyde (rhw) [Entry date 01/11/94]
•	•	• • • •
2/2/94	121	ORDER by Judge Saundra B. Armstrong sentencing hearing continued from 2/8/94 to 1:30 p.m. on 4/5/94 as to defendant Elmer Robert Hyde (rhw) [Entry date 02/03/94]
•	•	• • • •
2/9/94	123	ORDER by Judge Saundra B. Armstrong setting hearing on motion to withdraw guilty plea given under "choice of evil" duress by defendant Elmer Robert Hyde [116-1] for 1:30 p.m. on 3/15/94; Government's opposition to motion due 3/8/94 (rhw) [Entry date 02/10/94]
•	•	• • • •
3/15/94	133	MINUTES: before Judge Saundra B. Armstrong; denying motion to dismiss for prejudicial delay by defendant Elmer Robert Hyde [128-1], granting motion to remove assistant counsel, Michael Stepanian for sexual harassment and other acts of moral turpitude by defendant Elmer Robert Hyde [122-1], withdrawing advisory attorney Michael Stepanian for Elmer Robert Hyde and defendant pro se, sentencing hearing will be held at 1:30 p.m. on 4/26/94 as to defendant Elmer Robert Hyde (C/R: Larry White) (rhw) [Entry date 03/16/94]
•	•	• • • •
6/1/94	149	MINUTES: Evidentiary hearing held before Judge Saundra B. Armstrong. Motion under submission, as to defendant Elmer Robert Hyde. (C/R: Earl Pline) (rl)
•	•	• • • •

DATE		PROCEEDINGS
7/19/94	152	ORDER by Judge Saundra B. Armstrong denying motion to withdraw guilty plea given under "choice of evil" duress by defendant Elmer Robert Hyde [115-1] as to Defendant Elmer Robert Hyde, denying motion to withdraw guilty plea given under "choice of evil" duress by defendant Elmer Robert Hyde [116-1] as to Defendant Elmer Robert Hyde; sentencing hearing will be held at 1:30 p.m. on 10/4/94 as to Defendant Elmer Robert Hyde (rhw) [Entry date 07/20/94]
		* * * * *
2/28/95	166	MINUTES: before Judge Saundra B. Armstrong; sentencing Elmer Robert Hyde (1) count(s) 1, 2 -3, 4. sentenced to 30 months BOP to run concurrently; 3 years supervised release, dismissing counts Elmer Robert Hyde (1) count(s) 5, 6 -8. dismissed on government's motion
3/6/95	167	NOTICE OF APPEAL by defendant Elmer Robert Hyde from Dist. Court decision judgment; Not Paid; and motion for assignment of counsel as an indigent person (kc) [Entry date 03/07/95]
3/7/95	168	JUDGMENT and Commitment issued as to Elmer Robert Hyde; Judge Saundra B. Armstrong

[Filed Dec. 13, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. Cr. 91-0682-SBA

UNITED STATES OF AMERICA, PLAINTIFF

v.

ELMER ROBERT HYDE, a/k/a ELMER JAMES HYDE, a/k/a BOB HYDE, DEFENDANT

INDICTMENT

COUNT ONE: (18 U.S.C. §§ 1341 and 2(b))

The Grand Jury charges: T H A T

1. Beginning on or about the first day of November, 1987 and continuing thereafter until approximately the thirtieth day of September, 1988, in the City and County of San Francisco, State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises. Defendant HYDE conducted said scheme and artifice to defraud by holding himself out as a successful loan broker affiliated with an established money brokering business, Money Brokers Association ("MBA") and capable of securing loans from financing sources that had ample funds available, whereas, in truth

and fact, MBA was actually a shell company that he had set up for the purpose of collecting front end fees, and contrary to the representations made by HYDE, MBA had no track record of success in funding loans or providing any other legitimate services. By virtue of the scheme to defraud and the false pretenses and representations made in furtherance of it, HYDE obtained money both from individuals soliciting loan applicants for him ("co-brokers") and from loan applicants, without securing loans for the loan applicants or refunding their deposits, in spite of representations that said deposits were fully refundable.

2. It was a part of the scheme and artifice to defraud that beginning in the fall of 1987, defendant HYDE set up a residence in San Ramon, California and held himself out as being the president of MBA. HYDE then represented and caused to be represented, both orally and in writing, that MBA had been founded over forty years before and that it had been an enormously successful business, having placed thousands of business loans totalling several billion dollars. HYDE further represented and caused to be represented that MBA was the largest financial broker in the world.

3. It was a further part of the scheme and artifice to defraud that on or about December 24, 1987, in order to lend an aura of respectability to MBA, defendant HYDE submitted an application and a $125 dues payment to an organization called the International Society of Financiers, which then enabled HYDE to represent MBA as being a "certified international financier."

4. It was a further part of the scheme and artifice to defraud that defendant HYDE secured the services of Neil Elder to act as his spokesman in promoting and running MBA. One of Elder's functions was to do a videotaped sales pitch to promote MBA to individuals interested in being sales associates or "co-brokers" for MBA. In said videotape, and in other representations

that HYDE made or caused to be made, prospective co-brokers were lured by claims of very high salaries or commissions that could be made, with very little effort, by working for MBA. Prospective co-brokers were misled by claims that they could earn as much as $100,000 per month for as little as five or six hours of work and that they could earn these huge salaries while spending most of their time in leisure activities such as golf or tennis.

5. It was a further part of the scheme and artifice to defraud that in late 1987 and early 1988, HYDE placed or caused to be placed in newspapers in northern California ads soliciting individuals who wanted to make a lot of money as co-broker's and individuals who wanted financing for businesses. In response to inquiries, HYDE represented, orally and in writing, that a business called "Bancorp Ltd.," headed by "Nathan Silverman," had been funding MBA projects since 1946 and that MBA had access to thousands of investment sources worldwide. In truth and fact, as defendant HYDE well knew, there was no Bancorp Ltd. or Nathan Silverman providing funding sources to MBA.

6. It was a further part of the scheme and artifice to defraud that as a result of misrepresentation that HYDE made or caused to be made, a number of individuals signed agreements to act as co-brokers for MBA and these co-brokers proceeded to prepare loan packages based on information provided to them by prospective borrowers. The co-brokers also collected fees from prospective borrowers and in accordance with the system set up by HYDE, these fees were represented to be fully refundable.

7. It was a further part of the scheme and artifice to defraud that HYDE paid the co-brokers, or arranged for them to be paid, as an advance on their expected commissions, weekly salaries or stipends that depended on the amount of their respective monetary contributions to MBA. The loan packages that were assembled by the

co-brokers were given to defendant HYDE who represented that he was taking them to Southern California to arrange for funding. Defendant HYDE further represented that he was taking over the operations of Bancorp because Nathan Silverman had suffered a heart attack.

8. It was a further part of the scheme and artifice to defraud that in early March, 1988, defendant HYDE falsely represented that loan commitments had been on a number of the loan packages which he had taken to Southern California and that he would send the necessary paperwork to Neil Elder, who was serving as the head of the MBA office in Northern California. On the basis of defendant HYDE's representations, Elder prepared and sent commitment letters to a number of prospective borrowers, indicating that their requested loans had been approved. Contrary to the claims in these letters, HYDE secured no financing for any of the loan packages, failed to refund the loan application fees and merely used the fees collected for expenses or his personal benefit.

9. It was a further part of the scheme and artifice to defraud that in early March 1988, HYDE left California to avoid any complaints or demands against him for failing to fulfill the promises made to co-brokers and loan applicants. Unbeknownst to the co-brokers and loan applicants, HYDE then moved his operation to the New York metropolitan area where he continued to solicit fees and money under the false pretense that he was a legitimate loan broker.

10. On or about the 13th day of January, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be delivered by mail according

to the direction thereon a "Letter of Intent" purportedly signed by Nathan Silverman of Bancorp Limited, and reflecting the supposed approval of a loan to Quinlan Funeral Home, which letter was sent to the aforesaid Quinlan Funeral Home in Orland Park, Illinois.

All in violation of Title 18, United States Code, Sections 1341 and 2(b).

COUNT TWO: (18 U.S.C. §§ 2315 and 2(b))

The Grand Jury further charges: T H A T

1. All of the allegations of the first count of this indictment except those contained in the tenth paragraph thereof are realleged herein:

2. On or about the 6th day of January, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, did knowingly receive and possess money of the of the value of $5000 or more, to wit, a $5000 check written on a Citicorp Savings money market account from Illinois payable to Money Brokers Association and signed by William Allard, which check had crossed a State boundary after being unlawfully taken by defendant HYDE or his representatives as a result of false and fraudulent representations that defendant HYDE made or caused others to make as part of the scheme to defraud set forth above.

All in violation of Title 18, United States Code, Sections 2315 and 2(b).

COUNT THREE: (18 U.S.C. §§ 2315 and 2(b))

The Grand Jury further charges: T H A T

1. All of the allegations of the first count of this indictment except those contained in the tenth paragraph thereof are realleged herein;

2. On or about the 25th day of January, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, did knowingly receive and possess money of the of the value of $5000 or more, to-wit, a $5000 check written on the account of Rolando M. Fajardo at the NBD F & M Bank in Michigan payable to Money Brokers, which check had crossed a State boundary after being unlawfully taken by defendant HYDE or his representatives as a result of false and fraudulent representations that defendant HYDE made or caused others to make as part of the scheme to defraud set forth above.

All in violation of Title 18, United States Code, Sections 2315 and 2(b).

COUNT FOUR: (18 U.S.C. §§ 1341 and 2(b))

The Grand Jury further charges: T H A T

1. All of the allegations of the first count of this indictment except those contained in the tenth paragraph thereof are realleged herein;

2. On or about the 3rd day of February, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon a letter and a $2,500 check from a prospective borrower, TRK-INN Enterprises of Campbell, California, to the office of Money Brokers Association in San Francisco, California.

All in violation of Title 18, United States Code, Sections 1341 and 2(b).

COUNT FIVE: (18 U.S.C. §§ 1341 and 2(b))

The Grand Jury further charges: T H A T

1. All of the allegations of the first count of this indictment except those contained in the tenth paragraph thereof are realleged herein;

2. On or about the 3rd day of March, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be delivered by mail according to the direction thereon a letter and a $2,500 check from a prospective borrower, Auto Arc Industries of San Leandro, California, to the office of Money Brokers Association in San Francisco, California.

All in violation of Title 18, United States Code, Sections 1341 and 2(b).

COUNT SIX: (18 U.S.C. §§ 1343 and 2(b))

The Grand Jury further charges: T H A T

1. All of the allegations of the first count of this indictment except those contained in the tenth paragraph thereof are realleged herein;

2. On or about the 4th day of March, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be transmitted by means of wire in interstate commerce from California to Illinois certain signs, signals and sounds constituting a FAX copy of a letter from Money Brokers Association reflecting the supposed approval of a loan application made by Rodger Stone for the financing of a project called the Milwaukee Marine.

All in violation of Title 18, United States Code, Sections 1343 and 2(b).

COUNT SEVEN: (18 U.S.C. §§ 1343 and 2(b))

The Grand Jury further charges: T H A T

1. All of the allegations of the first count of this indictment except those contained in the tenth paragraph thereof are realleged herein;

2. On or about the 4th day of March, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly cause to be transmitted by means of wire in interstate comerce from California to Illinois certain signs, signals and sounds constituting a FAX copy of a letter from Money Brokers Association reflecting the supposed approval of a loan application made by Bill Allard of Illinois for a land investment.

All in violation of Title 18, United States Code, Sections 1343 and 2(b).

COUNT EIGHT: (18 U.S.C. §§ 1343 and 2(b))

The Grand Jury further charges: T H A T

1. All of the allegations of the first count of this indictment except those contained in the tenth paragraph thereof are realleged herein;

2. On or about the 4th day of March, 1988, in the State and Northern District of California and elsewhere,

ELMER ROBERT HYDE, a/k/a
ELMER JAMES HYDE, a/k/a
BOB HYDE,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attemping to do so, did knowingly cause to be transmitted by means of wire in interstate commerce from California to Illinois certain signs, signals and sounds constituting a FAX copy of a letter from Money Brokers Association reflecting the supposed approval of a loan application made by Romel Fajardo for a condominium development.

All in violation of Title 18, United States Code, Sections 1343 and 2(b).

DATED: 12-13-91

A True Bill.

/s/ Patricia C. Anderson
Foreperson

/s/ William T. McGivern, Jr.
WILLIAM T. MCGIVERN, JR.
United States Attorney

[Filed Nov. 29, 1993]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. CR-91-0672 SBA

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ELMER ROBERT HYDE, DEFENDANT

APPLICATION FOR PERMISSION TO ENTER PLEA OF GUILTY AND ORDER ACCEPTING PLEA

(Sentencing Guidelines)

The defendant, under penalty of perjury, declares that the following statements have been read and understood, and that each is true and correct:

1. My full name is Elmer Robert Hyde.
I am 72 years of age.
I have gone to school up to and including 2½ yrs college. I request that all proceedings against me be in my true name.

2. My advisor lawyer's name is MICHAEL STEPANIAN.

3. I have received a copy of the indictment or information before being called upon to plead. I have read the indictment or information, and have discussed it with my lawyer. I fully understand every charge made against me. I understand these charges to be:

18 U.S.C. § 1341 cts one, two, three, four
18 U.S.C. § 2315

4. I have told my lawyer all the facts and circumstances known to me about the charges against me in the

indictment or information. I believe that my lawyer is fully informed on all such matters.

5. I know that the Court must be satisfied that there is a factual basis for a plea of "GUILTY" before my plea can be accepted. I represent to the Court that I did the following acts in connection with the charges made against me in Counts "made false representations about sources of money and knew about it." (In the space provided, the defendant must set out in detail, what he or she did. Attach a separate page if more space is needed.)

6. My lawyer has counseled and advised me on the nature of each charge, on all lesser included charges, and on all possible defenses that I might have in this case.

7. I know that I may plead "NOT GUILTY" to any offense charged against me.

8. I know that if I plead "GUILTY", I am giving up all of the Constitutional rights listed below:

a. the right to a speedy and public trial by jury;
b. the right to see and hear all witnesses called to testify against me;
c. the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor;
d. the right to the assistance of a lawyer at all stages in the proceedings and if I cannot afford a lawyer, to have the Court appoint one to represent me without cost to me or based upon my ability to pay.
e. the right to take the witness stand at my sole option and, if I do not take the witness stand, no inference of guilty may be drawn from such a failure;
f. the right against self-incrimination;
g. the right to appeal from an adverse judgment.

9. I know that if I plead "GUILTY", there will be no trial either before a judge or jury.

10. I know that a plea of "GUILTY" will result in my conviction and that the Court may impose the same punishment as if I had pled "NOT GUILTY", stood trial and been convicted by a jury.

11. My lawyer has informed me that as to the offense charged in Count or Counts [1] one through eight, the law provides:

a. that the maximum imprisonment is 30 yrs years.

b. that the maximum fine is $1,000,000 special assessment.

c. that the statute which fixes the punishment for this offense requires a mandatory minimum penalty of ———

d. that the Court may order a term of supervised release to follow any term of imprisonment imposed.

12. If at this time I am at least 18 and not more than 26 years of age, I know that the Court may sentence me under the provisions of the Youth Corrections Act or as a Young Adult Offender for an indeterminate sentence (Title 18 U.S.C. Sec. 5010(b)), which may require me to spend as long as six (6) years in a penal institution, even though the punishment for the offense otherwise provided by law may be less.

13. (Strike if inapplicable) A special parole term of — years. I understand that if a special parole term is mentioned, it refers to a term which may be for any period, but not less than the period stated; if the terms and conditions of the special parole are violated, the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time spent on special parole; a person whose special parole term has been revoked may be required to serve all or part of the

[1] If more than one count, enter information for each count on a separate page.

remainder of the new term of imprisonment; and that a special parole is in addition to, and not in lieu of, any other parole provided by law.

14. I understand that I may be required to make restitution of any loss I have caused to any victim of my offense(s), and that I will be assessed *$50.00* for each felony and *$25.00* for each misdemeanor of which I shall be convicted.

15. I understand that under the provisions of certain criminal statutes, my property may be forfeited to the United States. I have been advised my my attorney of whether, and to what extent, property may be subject to forfeiture.

16. If I am on probation or parole in this case or any other Court, I know that by pleading guilty in this case, my probation or parole may be revoked, and I may be required to serve time in that case, which may be consecutive to, that is, in addition to, any sentence imposed upon me in this case.

17. I declare that no officer or agent of any branch of government (Federal, State or Local) has promised or suggested that I will receive a lighter sentence or probation, or any other form of leniency if I plead "GUILTY", except as listed below. If anyone else has made such a promise or suggestion, except as noted below, I know that the person had no authority to do so. (State any promises or concessions made to the defendant or his attorney.)

Plea Agreement

18. I know that the sentence I will receive is solely a matter to be decided by the Judge. I know that the Judge will use the Sentencing Guidelines in deciding what sentence to impose. My lawyer has explained the Sentencing Guidelines to me.

19. I know that if a recommendation is made by the Government in this case as to the sentence to be imposed, that the Judge is not bound to accept this recommenda-

tion, and that I do not have the right to withdraw my plea of guilty if the Judge does not accept the recommendation.

20. I consent to an immediate pre-sentence investigation by the Probation Department, and consent to a review of my pre-sentence report by the Judge.

21. I am satisfied that my lawyer has done all that a lawyer could do to counsel and assist me, and that I am satisfied with the advice and help my lawyer has given me.

22. I know that the Court will not permit anyone to plead "GUILTY" who maintains that he/she is innocent and, with that in mind, and because I am "GUILTY" and respectfully request the Court to accept my plea of "GUILTY" and to have the Clerk enter my plea of "GUILTY" as follows:

(The defendant's plea of "GUILTY" and "NOT GUILTY" to each offense should be entered.)

Guilty count one:	18 USC 1341 and 2(b)
Guilty count two:	18 USC 2315(b)
Guilty count three:	18 USC 2315(b)
Guilty count four:	18 USC 2315 2(b)

23. I do not believe that I am innocent; I wish to plead "GUILTY" because I am guilty.

24. My mind is clear. I am not under the influence of alcohol or drugs, and I am not under a doctor's care. The only drugs, medicines or pills that I have taken within the past seven days are: (If none, so state.)

Nitro glycerine
[Illegible] Pill Anti-Biotics

25. My decision to plead "GUILTY" has not been forced or coerced by any threats or compulsion, direct or indirect, to or upon me or any other person.

26. I OFFER MY PLEA OF "GUILTY" FREELY AND VOLUNTARILY AND OF MY OWN ACCORD

AND WITH FULL UNDERSTANDING OF ALL THE MATTERS SET FORTH IN THE INDICTMENT OR INFORMATION AND IN THIS APPLICATION AND IN THE CERTIFICATE OF MY LAWYER WHICH IS ATTACHED TO THIS APPLICATION, AND I REQUEST THAT THE COURT ACCEPT MY PLEA OR PLEAS OF "GUILTY."

Signed and sworn to be me in open Court in the presence of my attorney, this 29th day of Nov., 1993.

/s/ Bob Hyde
Defendant

[Certificate of Counsel Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DICTRICT OF CALIFORNIA

[Caption Omitted in Printing]

ORDER ACCEPTING PLEA

I FIND THAT:

1. The defendant enters this plea of guilty freely and voluntarily, and not out of ignorance, inadvertence, fear or coercion:

2. The defendant understands and knowingly, freely and voluntarily waives his/her Constitutional rights;

3. The defendant freely and voluntarily executed his/her Application for Permission to Enter a Plea of Guilty, and fully understands its contents;

4. The defendant has admitted the essential elements of the crime charged.

IT IS THEREFORE ORDERED that the defendant's plea of "GUILTY" be accepted and entered as prayed for in the Application for Permission to Enter a Plea of Guilty and as recommended in the certificate signed by his/her attorney.

Done in open Court this 29th day of November, 1993.

/s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

[Certificate of Service Omitted in Printing]

[Filed Nov. 29, 1993]

IN THE UNITED STATES DICTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

PLEA AGREEMENT

Plaintiff, the United States of America, by and through his counsel, Michael J. Yamaguchi, United States Attorney for the Northern District of California, and Joel R. Levin, Assistant United States Attorney for the Northern District of California; and the defendant, Elmer Robert Hyde, pro se, hereby enter into the following agreement pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. The defendant, at his own request, and after being fully informed of his right to appointed counsel at no expense to him, has chosen to waive his right to counsel.

1. The defendant will plead guilty to Counts one through four of the Indictment, charging him with mail fraud in violation of 18 U.S.C. § 1341 (counts one and four) and receipt of property of a value of at least $5000 which had crossed a state boundary after being taken by fraud (counts two and three) in violation of 18 U.S.C. § 2315. The government agrees to move to dismiss Counts five through eight of the Indictment. The defendant is pleading guilty because he is guilty, and acknowledges, as charged in the Indictment, that between approximately November of 1987 and September of 1988, he devised and intended to devise a scheme and artifice to obtain money and property by means of fraudulent pretenses, representations and promises and that the mailings specified in Counts one and four of the indictment were

made or caused to be made in furtherance of the scheme, and that the $5000 checks referenced in counts 2 and 3 were knowingly received by him in California after having been taken by fraud in another state.

2. The defendant understands that Counts one and four of the Indictment each carry the following penalty: a maximum penalty of five years in imprisonment, a $250,000 fine, a $50 special assessment, a period of not more than three years supervised release to follow any sentence of imprisonment, and restitution. The defendant further understands that Counts two and three of the Indictment each carry the following penalty: a maximum penalty of ten years imprisonment, a $250,000 fine, a $50 special assessment, a period of not more than three years supervised release to follow any sentence of imprisonment, and restitution. The defendant understands that the maximum penalty he faces for all four counts to which his pleading is a total of thirty years imprisonment, a $1,000,000 fine, a $200 special assessment, a period of not more than twelve years supervised release to follow any sentence of imprisonment, and restitution. The defendant further understands that he shall not be eligible for parole during any term of imprisonment imposed. The defendant acknowledges that the sentence to be imposed is within the sole discretion of the Court.

3. In exchange for the defendant's guilty plea to Count one, the government agrees that no further charges will be brought against the defendant for his operation of or involvement in Money Brokers Association. The government also agrees that no further charges will be brought against the defendant for his operation of or involvement in Financial Network Services (FNS) and/or International Financial Services (IFS) in 1987-1990. The government further agrees that no charges shall be brought against the defendant for any false statements that he made to the Social Security Administration in applying

for Supplemental Security Income ("SSI") payments in 1992.

4. The defendant acknowledges that he had had all of his rights explained to him and expressly recognizes that he has the following rights:

a. The right to plead not guilty and persist in that plea.

b. The right to a speedy and public jury trial.

c. The right to assistance of counsel at that trial and in any subsequent appeal.

d. The right to remain silent at trial.

e. The right to testify at trial if he wishes.

f. The right to confront and cross-examine government witnesses.

g. The right to present evidence and/or witnesses in his own behalf.

h. The right to compulsory process of the court.

i. The right to a unanimous guilty verdict.

The defendant further understands that he waives each and every one of the above rights by pleading guilty pursuant to this Plea Agreement, including his right to appeal a finding of guilt following his guilty plea, and it is his knowing and voluntary intention to do so. Defendant further acknowledges that if his guilty plea is accepted there will not be a trial of any kind.

5. The defendant acknowledges that the sentence to be imposed for this offense is governed by the Sentencing Guidelines (the "Guidelines") as promulgated by the Sentencing Commission under the Sentencing Reform Act of 1984. The parties stipulate, subject to the qualification in paragraph 6 below, that the defendant's offense level, under § 2F1.1, should include the net loss sustained in

the operation of Money Brokers Association, Financial Network Services and International Financial Services. The parties further stipulate that for purposes of §§ 1B1.3, 2F1.1 and 3D1.2 of the Guidelines, that the defendant's participation in Money Brokers Association, Financial Network Services and International Financial Services constituted a common scheme or plan and that such conduct should be "grouped" under § 3D1.2. The parties agree that the Guidelines in effect prior to November 1, 1989 govern this case and that under those Guidelines, the defendant's base offense level, under § 2F1.1, would be 6, with a 7 level increase because the amount of the loss was in the range of $200,001-$500,000. The parties further agree that a two level increase is warranted under § 2F1.1(b)(2) because the defendant's offense involved a scheme to defraud more than one victim. The parties further agree that only a two level increase is warranted under § 3B1.1 because the defendant was an organizer, leader, manager or supervisor in the criminal activity, but the activity did not involve five or more "criminally responsible" participants. Based on the foregoing calculations, the parties agree that the defendant's adjusted offense level is 17.

6. The parties agree that the sentence imposed in this case should include full restitution of the losses caused by the defendant in committing the Money Brokers Association, Financial Network Services and International Financial Services schemes. The government and the defendant agree that for purposes of restitution and for purposes of the Guideline calculation, the defendant is only responsible for payments to Money Brokers Association that were dated or deposited on or before March 13, 1988. The defendant and the government further agree that for purposes of restitution and for purposes of the Guideline calculation, the defendant is responsible for the net amount taken in by Financial Network Services and International Financial Services.

The defendant acknowledges that he has thoroughly and adequately discussed with his advisory counsel, Michael Stepanian, the effect of the Guidelines with respect to the entry of his guilty pleas.

7. This agreement is not binding upon the district court judge or the probation office. The district court will be free to make its own determinations pursuant to the Guidelines as to the appropriate sentence to be imposed. The defendant understands that the final decision as to which Guidelines apply rests with the court.

8. The defendant acknowledges that his advisory counsel has advised him of the nature of the charges, his possible defenses to the charges and the nature and range of possible sentences. The defendant is satisfied with the advice and assistance that his advisory counsel has provided to him.

9. The defendant specifically agrees that:

(a) A special assessment of $200 will be imposed as part of the sentence. The defendant agrees to pay that amount at or before the time of sentencing.

(b) The defendant waives his right to appeal any sentence that is within or below the guideline range of 27-33 months.

10. The defendant is entering his guilty plea freely and voluntarily, and not as the result of force, threats, assurances, or promises other than the promises contained in this agreement.

11. In signing this agreement, the defendant is not under the influence of any drug, medication, liquor, intoxicant or depressant, and is fully capable of understanding the terms and conditions of his plea agreement.

12. All promises here made by each party are made dependent on full performance of the promises made by the other party. Any commitment regarding the United States' sentencing recommendation applies only to the sentencing upon this Indictment and does not apply, for example, for any future proceedings concerning an alleged

violation of probation, violation of parole or supervised release.

13. If the defendant commits any crimes, violates any of the conditions of his release, or violates any term of this agreement between signing this agreement and the date of sentencing, or fails to appear for sentencing, the United States will be free to prosecute any and all criminal charges, including charges for any new offenses. The United States also will be free to recommend at sentencing on the charges to which the defendant has pleaded guilty, a sentence higher than that contemplated by this agreement. Whether the government pursues either or both of the alternative courses, the defendant will not be free to withdraw his guilty plea entered pursuant to this plea agreement.

14. The defendant agrees that if any applicable provision of the Sentencing Guidelines changes after entry of this plea agreement that any request by the defendant to be sentenced pursuant to those changed guidelines will make this agreement voidable by the government. In such circumstances, the government may charge, reinstate or otherwise pursue any and all criminal charges which could have been brought but for this plea agreement.

15. This agreement constitutes all the terms of the plea bargain between the government and the defendant, and the government has made no other representations to the defendant or his attorney.

DATED: 11/29/93

Respectfully submitted,

MICHAEL J. YAMAGUCHI
United States Attorney

/s/ Joel R. Levin
JOEL R. LEVIN
Assistant United States Attorney

I have consulted with my advisory counsel and fully understand all my rights with respect to the offenses charged in the Indictment. Further, I have consulted with my advisory counsel and fully understand my rights with respect to the provisions of the Sentencing Guidelines. I have read this plea agreement and carefully reviewed every part of it with my advisory counsel. I understand this agreement and I voluntarily agree to it.

DATED: 11/29/93

/s/ Bob Hyde
ELMER ROBERT HYDE
Defendant

I am Elmer Robert Hyde's advisory counsel. I have fully explained to him his rights with respect to the offenses charged in the Indictment. Further, I have reviewed those provisions of the Guidelines which may apply in this case. I have carefully reviewed every part of this plea agreement with him. To my knowledge, his decision to enter into this agreement is an informed and voluntary one.

DATED: 11/29/93

/s/ Michael Stepanian
Advisory Counsel

[Filed Feb. 25, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, November 29, 1993

* * * *

[2] THE CLERK: Calling Criminal 91-0672 U.S.A. versus Elmer Robert Hyde.

MR. LEVIN: Good morning, Your Honor, Joel Levin for the United States.

MS. BOERSCH: Martha Boersch also for the United States.

THE COURT: Good morning.

DEFENDANT HYDE: Good morning, Your Honor, ladies, Bob Hyde for the defendant pro se.

THE COURT: Good morning.

MR. STEPANIAN: Michael Stepanian as advisory counsel, Your Honor.

THE COURT: Good morning.

I am sorry, I didn't get her name?

MS. BOERSCH: Martha Boersch, B-O-E-R-S-C-H.

THE COURT: Who else is seated at—

MR. LEVIN: Sitting with us throughout the trial is . . . will be Special Agent Robert Schenke, S-C-H-E-N-K-E. He's with the FBI. He's the case agent on the case.

THE COURT: This matter is on at this point for trial. We have a few preliminary matters to discuss.

Let me just ask you before we get started with all of this if there is any possibility that this matter can be [3] settled.

MR. LEVIN: Your Honor, we had made an offer to Mr. Hyde last March when he was represented by Mr.

Sheridan, and it was what I considered to be a reasonable offer and we gave him a reasonable deadline, and he was interested.

This morning he has shown some interest in resuming discussions. We have not been able to agree. And we do not believe it would be appropriate for him to discuss with the court the substance of those discussions under Rule 11, or his views of Janet Reno, or his beliefs in the plea bargaining process.

But as I said, we did make an offer to him in March, he rejected that offer, and we have been unable to reach an agreement this morning.

THE COURT: Well, the reason I am asking the question is because I'm certainly amenable to giving you all more time to discuss this rather than embark on a two- to three-week trial if the matter can be resolved short of that. It's 9:15 anyway.

MR. STEPANIAN: Mr. Hyde, Your Honor, pardon me, but Mr. Hyde is prepared to accept the offer which was offered to him with Mr. Sheridan.

In the last . . . the basic difference, and I'll just say it, and I'm not suggesting the court make any opinions with respect to this except for the fact we all want to resolve this [4] matter short of a three-week trial.

The fact of the matter is that Mr. Hyde is prepared to accept the offer which was offered some time ago. Due, after he—after he went through this—after the certain aspects of the plea agreement which is now clarified for him, that is that the court determines his criminal history as an example, that the court determines aspects, and this plea agreement is a suggestion binding on the parties, but the court is the ultimate determination of what he's going to be sentenced to and the interpretation of the guidelines as is reflected from the input from both Mr. Levin, myself and the probation department. I mean, that's the ultimate determination of sentencing is the court.

Mr. Hyde now understands that. Perhaps he didn't at one time. And the fact is that his criminal history, as an example, is determined by the court.

THE COURT: That's correct.

MR. STEPANIAN: Now the only—

THE COURT: What's in the plea agreement is generally the parties' understanding based on what you all have—the information you have.

MR. STEPANIAN: This is true. And the fact of the matter is that the only problem we are having right now is Mr. Hyde is prepared to plead guilty to the original plea agreement but feels he cannot plead to eight counts because he feels in [5] his soul that he is not guilty of several of those counts. That is the basic problem that we have here.

And so, we're there. I mean the—yes, there was a deadline. Yes, he had another attorney when they were discussing it, but we're prepared to plead guilty right now.

And interestingly enough, we went through the suggestions in the plea agreement, and they—there is no suggestion in the plea agreement that we have a problem. In fact, the original plea agreement, save an understanding that the court determines its criminal history, which is not a real difficult concept, although the only problem with criminal history is that was one on parole at the time that the indictment is filed, or at the time the offense is committed. That's the bottom line.

THE COURT: Well, the bottom line is still the same. The court makes those determinations in the final analysis even if there is some dispute that the parties have with respect to the interpretation.

MR. STEPANIAN: If I can sort of grovel around, and sort of try and get some—try to get one count or something instead of eight counts, maybe we can resolve it. I don't know.

And I recognize the fact, Your Honor, that there are witnesses here, Mr. Schenke has been working. We all

have been working very hard. Yesterday, witnesses were being—

[6] THE COURT: Well, I'm certainly willing to give you some time. We don't have enough jurors now anyway so hopefully we will get some more within the next few hours. We don't have enough even to call the first batch.

MR. STEPANIAN: I'll stick around and try to work this out.

THE COURT: If you all think the amount of time, you know, some time would help, I am certainly willing to start this process at ten o'clock instead of—which will give you a little over half an hour.

MR. STEPANIAN: That would be fine, Your Honor.

MR. LEVIN: We are certainly willing to discuss it some more with Mr. Stepanian.

I think the record should reflect though that since we made that offer, we have put an enormous amount of work into this case and there are witnesses here who will be flown in from all over the country, some of whom who are here already.

And for Mr. Hyde to expect us to make the same offer on the morning of trial after we have done that, I think is pretty unreasonable. I just—just so the court understands where we are coming from on that.

MR. STEPANIAN: That is true.

THE COURT: I understand.

MR. STEPANIAN: I don't know about the unreasonableness, but the fact is there are witnesses here.

[7] DEFENDANT HYDE: Your Honor, may I say something please?

THE COURT: Sure.

DEFENDANT HYDE: While Mr. Levin is an excellent attorney, probably one of the best, I don't know what he has against Janet Reno, but since talking to you the last time, if I was ten minutes younger, Your Honor, I would want to go to trial and stick to trial because Janet Reno

our new Attorney General says that Mr. Levin's office here is intractable. She has reversed these decisions and asked them to be more reasonable, to use some sanity in this—let's say the worst possible situation. He has got me pleading guilty to crimes that somebody else committed which he knows and Agent Schenke knows—

THE COURT: I'm going to give you all some time to—

DEFENDANT HYDE: May I say one more thing?

THE COURT: I don't want to get into a discussion about Janet Reno. I'm not privy to those decisions and they don't seem to have any relevance to what I'm to determine this morning.

So my concern at this point is to give you all some time to see if there is some way to resolve this reasonably without expending the necessary two to three weeks of trial if the matter can be resolved short of that. If not, we will start the trial and I will—

[8] MR. STEPANIAN: Also Mr. Hyde would like to say that this form here, the prior form that he was—that he had been before Your Honor, he felt uncomfortable with, but feels that this form he understands that the court has discretion and will use its discretion in determining his final sentence is why he has changed his attitude vis-a-vis the plea agreement.

Am I correct?

DEFENDANT HYDE: Yes.

MR. STEPANIAN: Why don't we sit here for a few minutes.

MR. LEVIN: Your Honor, the one thing that—

THE COURT: Just a second.

(Pause in the proceedings.)

MR. LEVIN: The one thing that I think we also need to establish for the record is to the extent that Mr. Stepanian makes statements, or arguments, or whatever, that

Mr. Hyde is concurring in those. Mr. Hyde represents himself now.

So, I just want Mr. Hyde to be aware that should he disagree with anything that Mr. Stepanian says on his behalf, that he should let us know, advise the court.

THE COURT: I think that's a good point.

DEFENDANT HYDE: I certainly will, Your Honor and Mr. Levin.

THE COURT: Okay.

DEFENDANT HYDE: Thank you very much, Your Honor.

[9] THE COURT: Come back at ten o'clock.

MR. STEPANIAN: Mr. Hyde will be here?

THE COURT: Actually my—the purpose of my recessing was to give you all some time—

MR. STEPANIAN: This would be fine if we can stay here. If the Marshals have no objection.

THE COURT: That's fine.

THE CLERK: All rise.

(Proceeding recessed until 1:20 p.m.)

THE CLERK: Recalling criminal 91-0672 United States versus Elmer Robert Hyde.

MR. LEVIN: Good afternoon, Your Honor, Joel Levin for the United States.

THE COURT: Good afternoon.

DEFENDANT HYDE: Good afternoon, Your Honor, Bob Hyde defendant pro se.

THE COURT: Good afternoon.

MR. STEPANIAN: Good afternoon, Your Honor, Michael Stepanian, advisory counsel.

THE COURT: Okay. Good afternoon.

I understand you all have reached an agreement and Mr. Hyde is still working on the application; is that correct?

MR. STEPANIAN: We are. Mr. Hyde, through me, is finished with the application.

What pills are you taking?

[10] THE COURTS: Why don't you finish that and that will give me a chance to look at the plea agreement.

(Pause in the proceedings.)

THE COURT: The application misstates the charge in Count 4. We have count 4 is 2315 and that should be 1341; is that correct?

It should be 18 U.S.C. 1341.

Okay.

Mr. Hyde, before I accept your guilty plea, I'm required to ask you some questions which you must answer under oath.

So if you would please raise your right hand to be sworn by Madame clerk.

ELMER ROBERT HYDE, DEFENDANT, SWORN

THE COURT: Mr. Hyde, you understand that you are now under oath?

DEFENDANT HYDE: I am sorry?

THE COURT: Do you understand that you're under oath?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Do you also understand that because you're under oath you must tell the truth?

DEFENDANT HYDE: Yes, Your Honor, I do.

THE COURT: Do you understand that if you fail to tell the truth, or if you provide false statements to the court at this time that the Government may bring additional charges [11] against you which will carry penalties in addition to those that you're currently faced with?

DEFENDANT HYDE: I understand that, Your Honor.

THE COURT: I'm going to ask you some questions to determine whether you are intending to change your plea and whether you—to make sure that you knowingly, voluntarily, and intelligently want to enter a guilty plea.

I'm also going to ask you some questions concerning

the crimes that you're pleading guilty to and you will be required to answer those questions.

If you feel that you would like to consult with your Advisory Counsel at any time prior to answering any of my questions, please feel free to do so.

Defendant Hyde: All right, Your Honor.

THE COURT: If you don't understand a question that I ask you, don't attempt to answer the question, just tell me you don't understand the question and I'll rephrase the question before you are required to answer it. Okay?

Defendant Hyde: Yes, Your Honor.

THE COURT: What is your full name?

DEFENDANT HYDE: Elmer Robert Hyde.

THE COURT: What is your age?

DEFENDANT HYDE: Seventy-two years old, Your Honor.

THE COURT: What is the highest educational level you have achieved?

[12] DEFENDANT HYDE: Approximately two a half years of College.

THE COURT: Can you read and write English?

DEFENDANT HYDE: I am sorry?

THE COURT: Can you read and write English?

DEFENDANT HYDE: Yes, I can, Your Honor.

THE COURT: Prior to coming to court today, have you had any alcoholic beverages?

DEFENDANT HYDE: No, I haven't Your Honor.

THE COURT: Within the past twenty-four hours, have you taken any medications or drugs whether prescribed by a physician or not ?

DEFENDANT HYDE: Just some antibiotics and my nitroglycerin for my heart.

THE COURT: You have taken nitroglycerin for your heart approximately what time?

DEFENDANT HYDE: It depends how it feels, Your Honor. It varies.

THE COURT: Within the past twenty-four hours you have taken the nitroglycerin for your heart.

Do you recall what time you took the nitroglycerin?

DEFENDANT HYDE: Approximately an hour ago and about an hour before that, thereabouts.

THE COURT: And you said you have also taken antibiotics. Do you know what antibiotics you have taken?

[13] DEFENDANT HYDE: Just for a cold, Your Honor.

THE COURT: For a cold?

DEFENDANT HYDE: Uh-huh.

THE COURT: Either—you don't know what the antibiotics were?

DEFENDANT HYDE: No, I'm afraid not.

THE COURT: With respect to the nitroglycerin and the antibiotics, are either of those medications interfering at all with your ability to understand what is going on here this afternoon?

Defendant Hyde: Not at all, Your Honor.

THE COURT: Okay. Are there any side effects that you are experiencing or feel as a result of having taken the nitroglycerin or antibiotics?

DEFENDANT HYDE: No, Your Honor.

THE COURT: Are you feeling sick in any way that would prevent you from understanding what is going on here?

DEFENDANT HYDE: No, I am not.

THE COURT: Do you in fact understand what is going on here this afternoon?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Do you understand that you have a right to maintain your not guilty plea?

DEFENDANT HYDE: Yes, I do.

THE COURT: AND IF you enter a not guilty plea, you [14] understand you have the right to have a trial?

DEFENDANT HYDE: Yes, Your Honor, I understand that.

THE COURT: Do you further understand that you would have a public trial by a jury composed of twelve citizens of this district.

DEFENDANT HYDE: Yes, Your Honor.

THE COURT: As a matter of fact, that is why we are here today for the jury trial?

DEFENDANT HYDE: Yes. That's right.

THE COURT: At the trial you have a right to have an attorney represent you, either one retained and paid for by you or if you could not afford a lawyer, of course, the court will appoint a lawyer to represent you and the government would bear the expense of the lawyer.

You also understand that you have the right to waive a lawyer and to represent your self at this trial; is that correct?

DEFENDANT HYDE: Yes, that's correct, Your Honor.

THE COURT: At the trial, if we had a trial, the burden would be on the government to prove your guilt beyond a reasonable doubt.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: In order to prove your guilt beyond a reasonable doubt, the government would be required to call [15] witnesses who would appear here and testify in open court.

Do you understand that?

DEFENDANT HYDE: Yes, I do.

THE COURT: Do you also understand that you have a right to see, confront, and to cross-examine each of the government's witnesses?

DEFENDANT HYDE: Yes, Your Honor, I understand that.

THE COURT: During the trial, you also have the constitutional right to remain silent, which means no one

could compel or require you to be a witness against yourself.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: And the fact that you choose to exercise your right to remain silent could not be used against you, and could not be held against you, which means that neither the judge nor the jury trying this case could infer or presume that you were guilty simply because you chose to exercise your right to remain silent.

Do you understand that?

DEFENDANT HYDE: I understand that.

THE COURT: On the other hand, you may choose to call you as a witness, or call other witnesses on your behalf, or introduce such other evidence as permitted by the Federal Rules of Evidence.

Do you understand that?

[16] DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: That's in addition to cross-examining the witnesses that the Government presents against you.

Do you understand that?

DEFENDANT HYDE: Yes, I do.

THE COURT: The fact that you choose to present evidence of any kind still does not alter the burden of proof at trial. The Government always bears the burden of proving your guilt beyond a reasonable doubt on each of the charges brought against you.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: If you had witnesses who had evidence that you feel would be have assistance to you and those witnesses refuse to come voluntarily, you have the right to use the subpoena powers of this court to compel the attendance have witnesses on your behalf.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Do you understand that by entering a guilty plea you give up your right to have a trial?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Do you also understand that if I accept your guilty plea there will in fact be no trial?

DEFENDANT HYDE: That's correct, Your Honor.

[17] I understand that.

THE COURT: Has anyone threatened you in any way to make or force you to enter a guilty plea?

DEFENDANT HYDE: No, they haven't, Your Honor.

THE COURT: Are you pleading guilty to protect anyone?

DEFENDANT HYDE: No, I am not.

THE COURT: Are you being pad by anyone to enter a guilty plea?

DEFENDANT HYDE: No, I am not.

THE COURT: I have been handed two documents, one of which is the plea agreement which is dated today. And on page 8 of this document at the bottom there is a signature above the line that says Elmer Robert Hyde.

Is this your signature, Mr. Hyde? (indicating)

DEFENDANT HYDE: Yes, it is, Your Honor.

THE COURT: I have also been handed an application for permission to enter a plea of guilty. And on page 6 of this document which is also dated today's dated, there is a line that's typed in defendant and there is a signature above that.

Is this your signature, Mr. Hyde (indicating)

DEFENDANT HYDE: Yes, it is, Your Honor.

THE COURT: Other than the promises or representations that have been made that are contained in this [18] plea agreement that have been handed, has anyone promised you anything else to induce you to change your plea of guilty?

DEFENDANT HYDE: No, they haven't, Your Honor.

THE COURT: Do you understand that the offenses to which you're pleading guilty are felony offenses?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: And do you also understand that if I accept your guilty plea, you will be adjudged guilty of these felony offenses and such adjudications may deprive you of certain valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of a firearm?

DEFENDANT HYDE: Yes, I understand that, Your Honor.

THE COURT: Do you also understand that under the Sentencing Reform Act of 1984, the United States Sentencing Commission has issued guidelines for courts to follow in determining the most appropriate sentence in a criminal case?

DEFENDANT HYDE: Yes, I understand that, Your Honor.

THE COURT: Have you had an adequate opportunity to discuss with your advisory counsel how the sentencing guidelines might apply to your case?

DEFENDANT HYDE: Yes, I have, Your Honor.

THE COURT: Do you understand that the Court will not be able to determine finally what the appropriate sentence is until after the Probation Department has completed the [19] presentence report, and you and the Government have had an opportunity to challenge the facts in the presentence report. It will only be at that point that the court will be able to determine the appropriate sentence for your case.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Do you also understand that parole has been abolished, and if you are sentenced to prison you would not be released on parole?

DEFENDANT HYDE: Yes, I understand that.

THE COURT: As part of the sentence, the Government is going to be recommending that Counts 5 through 8 be dismissed; is that correct?

MR. LEVIN: That's correct, Your Honor.

THE COURT: Is that the only promise that is being made other than the fact that no additional charges will be filed as a result of the plea to Count 1?

MR. LEVIN: No additional charges. We have also agreed that no additional charges will be filed for certain other schemes the defendant committed that are set forth in the plea agreement. No charges will be filed against him for Social Security, false statement that he allegedly committed. And we have also agreed—reached certain agreement with him regarding the application of the guidelines to this offense which are set forth in the plea agreement as well.

[20] THE COURT: You have here that the—that it's pursuant to 11(e)(1)(B), but I think it is 11(e)(1)(A). Let me check.

MR. LEVIN: Oh.

Probably is more (e)(1)(A).

THE COURT: Because you are not making any recommendations with respect to sentences.

MR. LEVIN: We haven't agreed as far as what our recommendation will be, right.

THE COURT: Mr. Hyde, do you understand that the Government, as part of the plea agreement, has agreed to dismiss certain counts contained in the indictment?

DEFENDANT HYDE: Yes, I understand that, Your Honor.

THE COURT: Do you also understand that I may accept or reject this agreement today, or I may reserve ruling to accept or reject the plea agreement pending completion of the presentence report?

DEFENDANT HYDE: I understand that, Your Honor.

THE COURT: Okay. And with respect to any recommendaion of the Government, do you also understand

that that is basically all it is, is a recommendation. The Court is always free to accept or reject a recommendation of the Government?

DEFENDANT HYDE: I understand that, Your Honor.

THE COURT: Should the Court—Mr. Hyde, have you [21] had an opportunity to review the indictment with your advisory counsel?

DEFENDANT HYDE: Yes, I have, Your Honor.

THE COURT: Would you like me to read the indictment pending against you or do you waive reading of the indictment?

DEFENDANT HYDE: I would waive the reading of the indictment, Your Honor.

THE COURT: Do you understand what you're charged with in. . . Let's start with Count 1 of the indictment?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Will you tell me in your own words what you have done that leads you to conclude that you should plead guilty to Count 1 of the indictment?

DEFENDANT HYDE: Well, basically made false statements, material facts that people relied on and they were defrauded from . . . by relying on that . . . misrepresentations that I made.

THE COURT: That's pretty general. Can you be a little more specific please?

DEFENDANT HYDE: Basically the misrepresentations, Your Honor, I represented to these people that I was able to obtain funding for certain financial businesses or ventures, and then I was unable to produce that. I couldn't produce that money and I didn't really think I could to begin with, but I was just unable to produce that money.

[22] THE COURT: Let me start with . . . Mr. Levin, will you please indicate for the record the evidence that the Government is prepared to present with repsect to Count 1 if this matter would go to trial?

MR. LEVIN: Your Honor, if the matter were to go to trial we would be prepared to show that in the fall of 1987, the defendant placed newspaper ads in the San Francisco paper indicating that—or soliciting people who were interested in working as loan brokers and indicating that they could make very large salaries if they worked as loan brokers, in the hundred thousand dollars or more per year they could make.

People who responded to the ad would testify that they met with Mr. Hyde and spoke with Mr. Hyde, and Mr. Hyde indicated to them that he was very experienced and successful in the area of money brokering, that he had been working in that area for approximately forty years, had done—had funded I think four thousand or so loans, and had very good sources of money.

They would also testify that he offered them the opportunity to work as loan brokers for them in return for them paying a fee of which varied in amount depending upon the return that they were to get from their activities.

The people would testify that they, based on the representations that Mr. Hyde made to them about his prior experience and success, they joined on with money brokers, and [23] worked for Mr. Hyde in money brokers, and that they then went out and based on the representations, they solicited loan applicants who had to pay a twenty-five hundred dollar fee in order to have their loan application considered by Money Brokers Association.

We would introduce bank records which would show that the money the loan applicants paid to money brokers was deposited by Mr. Hyde into one of two accounts that he had established, and that the money thereafter was used by Mr. Hyde for personal purposes and some of the money was returned to the loan brokers as commission or salaries.

We would be prepared to prove that the representations Mr. Hyde made about his background and his success were inaccurate and false, and that to the extent we could

reestablish his employment record over the past thirty years, it would reflect sporadic employment as a pool or insulation salesman. There was some period of time where he was in prison, approximately eight years since 1960, but the evidence would indicate no period of time where he was operating that we are aware of that he was operating as a successful money broker.

Based on the representations that he made, and the money brokers that he was able to solicit and the money brokers who joined him, we would establish in count 1 that a Joseph Quinlan who was interested in financing a funeral home in the [24] Chicago area was contacted by a co-broker that Mr. Hyde had engaged, a Mr. David Whitehead in Chicago. And that Mr. Quinlan submitted a loan application, and then on January 13th, approximately January 13th, 1988, Mr. Quinlan received in the U.S. mail a letter of intent purportedly signed by a Nathan Silverman of Bancorp, Ltd. reflecting the supposed approval of his loan, the loan that he had requested.

We would prove through the FBI investigation of public source records such as the secretary of state, that as far as we can determine Bancorp Ltd. does not exist, and did not exist at the time in the state of California, and that our investigation has also disclosed that there was no Nathan Silverman who existed who was in the business of money brokering.

We would also introduce evidence that there are similarities between the signature of Nathan Silverman on that letter and Mr. Hyde's signature as well.

We would also introduce evidence that Mr. Quinlan never received the loan that was referred to in that letter, and never received a refund of the money that he had paid, that is, the twenty-five hundred dollars.

We would introduce evidence that Mr. Hyde after receiving a number of fees from different loan applicants and co-brokers, moved down to Tustin, California and stayed in that area for a month or so, and then in early

March of 1988, he [25] left that area without any notice to the co-brokers or the loan applicants, and went to the New York area.

And that is, in a nutshell, what we would be prepared to prove.

THE COURT: For Count 1.

MR. LEVIN: For Count 1.

THE COURT: Okay. Mr. Hyde, were you able to hear everything Mr. Levin indicated he would be prepared to prove if this matter were to go to trial with respect to Count 1?

DEFENDANT HYDE: Yes. I am sorry I had to cough while he was doing that, Your Honor. I heard everything he said.

THE COURT: Are there any corrections or modifications or anything concerning what he said that you dispute at this point, or is what he said basically accurate with respect to—

DEFENDANT HYDE: Basically I would say it's accurate, Your Honor.

THE COURT: Now with repect to Count 2 of the indictment, if you will tell me in your own words what you did that leads you to conclude that you should plead guilty to Count 2?

DEFENDANT HYDE: On Count 2, Your Honor, I'm not exactly sure who is involved. I believe it was one of the brokers that was working with me. And that he did obtain a [26] five thousand dollar check from Mr. William Allard, and I did deposit that in the—in our bank. I'm not really certain of how that was used or distributed in the business some way. But we did receive that money.

THE COURT: You mean subsequent to your depositing it in the account, you are not certain what you did with the proceeds?

DEFENDANT HYDE: Yes. It was back in the business, I mean—

THE COURT: Excuse me.

DEFENDANT HYDE: I'm sorry?

THE COURT: I didn't mean to interrupt you.

DEFENDANT HYDE: I'm not quite sure on here without being able to get into the records and find out where the money went, but we did get the money and did deposit it in the account.

THE COURT: You received the money from across state lines. Where did you receive the money?

DEFENDANT HYDE: In other words, I believe this was mailed from the Chicago area, I believe. Illinois, yes, Your Honor.

THE COURT: Mr. Levin, would you please indicate for the record what the government would be prepared to prove as to Count 2 if this matter went to trial?

MR. LEVIN: Yes, Your Honor.

[27] In addition to what I have already stated about general background of the offense, specifically with reference to Count 2, we would be prepared to show that two of the individuals that Mr. Hyde engaged as co-brokers in this enterprise were Mr. Neil Elder and David Whitehead.

Mr. David Whitehead resided in the Chicago area and solicited loan applicants on behalf of Money Brokers Association.

We would prove that one of the loan applicants who expressed an interest in getting a loan through Money Brokers was a man named William Allard, and that Mr. Elder, with Mr. Hyde's knowledge, went to Chicago in order to meet with Mr. Allard and receive the loan application fee of five thousand dollars.

We would testify that Mr. Elder did, in fact, go to Chicago, he met with Mr. Allard, he had him fill out Money Brokers' documents including a financial service agreement. He received the check from Mr. Allard in the amount of five thousand dollars that was written on an Illinois account.

Mr. Elder then took that five thousand dollars back to California, where he gave the check to Mr. Hyde and told Mr. Hyde what he had done in Chicago.

We would further prove that that five thousand dollar check was deposited into the Money Brokers Association account at the First Interstate Bank in San Ramon. And as I have [28] indicated previously, the proceeds from the bank accounts were used to some extent by Mr. Hyde for personal purposes, and to some extent money was redistributed to co-brokers.

Mr. Allard would testify that he never got the loan, he did not, contrary to the representations that were made to him, he never received a refund for the five thousand dollars either.

THE COURT: Mr. Hyde, were you able to hear what Mr. Levin indicated that he would be prepared to prove if this matter were to go to trial with respect to Count 2?

DEFENDANT HYDE: Yes, Ma'am.

THE COURT: Are there any corrections, or additions, or modifications you would like to make to what he said, or do you have any dispute with what he says that you did with respect to Count 2?

DEFENDANT HYDE: I think that's basically true, Your Honor.

THE COURT: With respect to Count 3, if you would please indicate for the record what you did that leads you to conclude that you should plead guilty to Count 3?

DEFENDANT HYDE: Are you asking me, Your Honor.

THE COURT: Yes, Mr. Hyde, please.

DEFENDANT HYDE: Yes. Here again, I know that we received a check from a Mr. Fajardo, but I can't follow it at this point where it went. It went into the account and it was [29] disbursed between brokers, myself, and the business.

So we did—we did receive that check from Mr. Fajardo here, and I am sorry that I can't tell you exactly where that five thousand went.

THE COURT: You did receive the check from Mr. Fajardo in the amount of five thousand dollars?

DEFENDANT HYDE: Yes, Your Honor.

THE COURT: And you deposited it in the account?

DEFENDANT HYDE: Yes, I did, Your Honor.

THE COURT: Was this a check that you also received in the mail?

DEFENDANT HYDE: Well, it obviously came from Michigan, and so it had to come by some process, more likely by mail, Your Honor.

THE COURT: Okay. Mr. —and you say some of it was divided between you and—

DEFENDANT HYDE: Associate brokers and business expense.

THE COURT: Mr. Levin, if you will please indicate for the record what the Government would be prepared to prove with respect to Count 3?

MR. LEVIN: Yes, Your Honor.

In addition to the background that I have previously given on the other two counts, we would be prepared to show that Mr. Fajardo, Rolando Fajardo was a loan applicant who [30] responded to the solicitations in the newspaper that were placed in the Chicago area by Money Brokers associate David Whitehead. That with knowledge and consent of Mr. Hyde, Neil Elder traveled to the Chicago area on a couple of occasions to meet with Mr. Fajardo and the other loan applicants in Chicago and to execute financial service agreements with them as well as to receive their loan application fees.

We—Mr. Elder would testify that on approximately January 19th of 1988, with Mr. Hyde's knowledge and consent, he traveled to the Chicago area. He met with Mr. Fajardo. He had Mr. Fajardo execute a financial service agreement and he received a five thousand dollar

check as an application—loan application fee that Mr. Fajardo had written on an account at the MBDF&M Bank in Michigan, which check was payable to Money Brokers.

Mr. Elder would testify that he took that check back to California, that he gave it to Mr. Hyde, and the evidence would show that Mr. Hyde deposited that check into a Money Brokers Association account at First Interstate Bank in San Ramon. And as I have indicated previously, the funds were disbursed to Mr. Hyde for personal purposes as well as some of it was redistributed to co-brokers.

THE COURT: Hr. Hyde, have you been able to hear what Mr. Levin indicates the Government would be prepared to prove if this matter vent to trial with respect to Count 3?

[31] DEFENDANT HYDE: Yes, Your Honor, I have heard and it's basically correct.

MR. LEVIN: Let me add on Count 3, once again, Mr. Fajardo indicate that contrary to the representations made to him, he never got a refund of his loan and the loan was never funded.

THE COURT: Okay.

Mr. Hyde, with respect to the additional part, did you have any corrections or any dispute with that

DEFENDANT HYDE: That is correct, Your Honor.

THE COURT: And finally with respect to Count 4, Mr. Hyde, if you could please indicate for the record what you did that leads you to conclude that you should plead guilty to Count 4?

DEFENDANT HYDE: Basically the same thing, Your Honor, in another individual here of twenty-five hundred dollars from a company in Campbell, California. And it was deposited to my account.

And here again, it was disbursed through other associate brokers, myself, and business expenses, things of that line, Your Honor.

THE COURT: Mr. Levin, will you please indicate for the record what the Government would prove with respect to Count 4?

MR. LEVIN: Yes, Your Honor.

[32] With respect to Count 4, in addition to what I have already given as the background of the other three counts, we would prove that in response to the solicitations that were made in the San Francisco area by Money Brokers Association, an individual who was interested in financing and starting a truck stop and who was operating under the business name of TRK-INN Enterprises of Campbell, California, was or made contact with one of the co-brokers of Money Brokers Association.

And that co-broker, based on the information they had received from Mr. Hyde, made representations to the TRK-INN Enterprises individuals regarding Money Brokers Association and money brokers—and what funding was available through Money Brokers Association.

Based on those representations, the individuals who were identified with TRK-INN Enterprises wrote out a twenty-five hundred dollar check as a loan application fee, and they filled out the appropriate paperwork, and they mailed it to the office of Money Brokers Association in the United States mail in San Francisco, California.

Once again, we would prove that these individuals did not get the loan that they were applying for at the time and the twenty-five hundred dollars as far as we can ascertain was not refunded to them by Money Brokers Association.

THE COURT: Mr. Hyde, were you able to hear what Mr. Levin indicates the Government would prove with respect to [33] Count 4 if this matter went to trial?

DEFENDANT HYDE: Yes. That is also basically correct, Your Honor.

THE COURT: Okay. And you said you have no dispute with what he said with respect to Count 4?

DEFENDANT HYDE: No, I do not, Your Honor.

THE COURT: Okay. Did you commit these crimes, Mr. Hyde?

DEFENDANT HYDE: Yes, Your Honor, I did.

THE COURT: Do you understand that the maximum penalty which may be imposed with respect to Counts 1 and Count 4, which are both mail fraud sections which allege violation of Title 18, United States Code, Section 1341, the maximum penalty for each of these counts is five years imprisonment, two hundred fifty thousand dollar fine or both, fifty dollar special assessment and up to three years supervised release?

DEFENDANT HYDE: Well, Your Honor, I'm not quite clear on that. I was looking at the guideline levels as what appears to be—we have agreed on offense level 17, and looking at the guideline chart on that, I understand what that would mean if the Court were to—

THE COURT: Let me tell you, as I indicated first of all, with respect to the application of the sentencing guidelines, the Court will not be able to determine finally what the applicable guideline range is nor what the specific [34] sentence shall be until after you all have had an opportunity to review the presentence report, and challenge whatever the facts are in the report, then I will be able to determine the appropriate guideline sentence.

What I am telling you now is the maximum possible penalty, which includes the statutory penalties and the statutory fines which may be greater than you will end up with, but you need to understand what the maximum penalties are.

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: So with respect to the mail fraud section, which are alleged in Count 1 and Count 4, the maximum penalty for each of these violations is five years in prison, two hundred fifty thousand dollar fine or both, plus a fifty dollar special assessment for each, and up to three years supervised release for each count.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Do you also understand that with respect to Counts 2 and 3, which are the counts which allege violations of Title 18, United States Code, 2315, which is receipt of property of a value of at least five thousand dollars, which have crossed the state boundary after being taken by fraud, the maximum penalty for each of these violations is ten years imprisonment, a two hundred fifty thousand dollar fine or both, fifty dollar special assessment and up to three years [35] supervised release for each.

Do you understand that?

DEFENDANT HYDE: Yes, Your Honor.

THE COURT: So looking at it with respect to Counts 1 and through 4 cumulatively, taken together, the maximum penalty on all four counts is thirty years imprisonment, one million dollar fine, two hundred dollar special assessment, and up to twelve years of supervised release.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Do you also understand that the Court is required to order you to make restitution to any victim which may have—who may have sustained a loss as a result of your behavior, unless the Court provides specific reasons on the record for not ordering you to do so.

Do you understand that?

DEFENDANT HYDE: Yes, I do, Your Honor.

THE COURT: Are you pleading guilty because you are, in fact, guilty of these charges?

DEFENDANT HYDE: Yes, I am, Your Honor.

THE COURT: Let me ask you. At this point you don't know what the amount of restitution is. Is that subject to be determined?

MR. LEVIN: That's right, Your Honor.

THE COURT: Now, before I—before I accept your [36] guilty plea to these charges, Mr. Hyde, I do have a couple of questions I want to ask you.

You have been represented up to this date by Mr. Stepanian, who is at this point your advisory counsel, although you are representing yourself; is that correct?

DEFENDANT HYDE: That's correct, Your Honor.

THE COURT: And up to today and including your representing yourself and Mr. Stepanian providing you with advice, has Mr. Stepanian given you all the legal advice you have needed or wanted?

DEFENDANT HYDE: Mr. Stepanian has been more than anybody can ask for in the way of a lawyer and a friend. He has done everything way beyond the call of duty to help me, Your Honor.

THE COURT: Okay. Has Mr. Stepanian done anything that you have previously objected to or object to now?

DEFENDANT HYDE: Not at all. He has been just wonderful.

THE COURT: So you're satisfied with the legal support and representation from Mr. Stepanian who is currently your advisory counsel?

DEFENDANT HYDE: Absolutely, Your Honor.

THE COURT: Do you need to obtain any further legal advice from your advisory counsel before the Court accepts your guilty pleas?

[37] DEFENDANT HYDE: I think I have been very well advised, Your Honor, by Mr. Stepanian. He's a credit to the Court, I might add.

THE COURT: Okay.

Mr. Hyde, how do you plead to Count 1 of the indictment which alleges a violation of Title 18, United States Code, Section 1341, mail fraud; guilty or not guilty?

DEFENDANT HYDE: Guilty, Your Honor.

THE COURT: With respect to Count 2, how do you plead to a violation of Title 18, United States Code, Section 2315, which alleges your receiving property of a value of at least five thousand dollars which crossed state boundary after being taken by fraud; guilty or not guilty?

DEFENDANT HYDE: Guilty, Your Honor.

THE COURT: And how do you plead to a violation of—excuse me, Count 3 in the indictment, which is also a violation of Title 18, United States Code, Section 2315, receiving property of a value of at least five thousand dollars which has crossed the state boundary after being taken by fraud; guilty or not guilty?

DEFENDANT HYDE: Guilty, Your Honor.

THE COURT: Finally, how do you plead to Count 4 of the indictment, which alleges violation of Title 18, United States Code, Section 1341, mail fraud; guilty or not guilty?

DEFENDANT HYDE: Guilty, Your Honor.

[36] THE COURT: These sections also charge here violation of Section 2(b), willfully causing an offense against the United States.

MR. LEVIN: That's right, Your Honor.

THE COURT: Mr. Hyde, how do you plead to violation of Title 18, United States Code, Section 2(b) willfully causing an offense against the United States; guilty or not guilty?

DEFENDANT HYDE: Yes, Your Honor, I willfully did commit the crimes.

THE COURT: The Court finds the defendant has knowingly, voluntarily, and intelligently with the advice of his advisory counsel entered a guilty plea.

The Court further finds that the elements required to support a conviction under Title 18, United States Code, Section 1341, 2315, and 2(b) have been satisfied.

The Court further finds that there is a sufficient factual basis to support the plea.

The Court accepts the guilty plea. The Court reserves ruling on whether to accept the plea agreement pending completion of the presentence report.

Is there anything further at this point before setting the matter for judgment and sentencing?

MR. STEPANIAN: I have spoken—had a short opportunity to speak to the acting supervisor of the marshals,

Your Honor, and we would request the Court, ask Mr. Hyde to go [39] back to Pleasanton. He was going to be housed here in San Francisco during trial.

THE COURT: Okay.

DEFENDANT HYDE: Thank you, Your Honor.

THE COURT: Do you need an order for that?

DEPUTY MARSHAL: No.

MR. STEPANIAN: Thank you, Your Honor.

DEFENDANT HYDE: Thank you, Your Honor.

MR. STEPANIAN: Nothing else, Your Honor.

Earliest—I don't know what probation, but if we can do it early period that would be acceptable.

THE COURT: February 1st, 1994.

MR. STEPANIAN: One moment, please.

That—may we have the 8th? I'm not here on the 1st.

THE COURT: Mr. Hyde, is that agreeable?

DEFENDANT HYDE: That is agreeable, Your Honor.

THE COURT: February 8th?

DEFENDANT HYDE: Yes, Your Honor.

THE COURT: February 8th, 1994 at 1:30 in the afternoon for judgment and sentencing.

MR. STEPANIAN: Thank you.

MR. LEVIN: Thank you, Your Honor.

DEFENDANT HYDE: Thank you.

(Proceedings adjourned)

[Filed Jan. 10, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

MOTION TO WITHDRAW GUILTY PLEA GIVEN UNDER "CHOICE OF EVIL" DURESS PURSUANT TO F.R.C.P. RULE 32(d)

To: The Honorable Sandra Brown Armstrong, Judge:

Comes now, Robert E. Hyde, defendant, in Pro Se to move this Honorable Court to withdraw his guilty plea for the following "fair and just reason," that is:

I pled guilty to crimes I did *NOT* commit because;
I was in *FEAR FOR MY WIFE'S LIFE.*

FACTS OF THIS MATTER

Justice Department employees intentionally put the fear of death in my wife's mind to the extent I was forced to plead guilty to crimes I did not, in fact, commit, in order to save her life. For nearly 1½ years there has been ongoing constantly increasing acts of harassment, intimidation, threats, and physical as well as mental acts endangering my wife's life caused by these Justice Department employees and others they recruited and encouraged to threaten her life. At home, at work, wherever she is, or goes, she goes in fear. Even when she comes to Court (which has been everytime) when I have to appear, she fears she will be arrested and imprisoned to put pressure on me to plead guilty to their false charges. Each time she answers the phone it is with fear for her life. We both had and still have great fear for her life and it has not ended with my guilty plea.

The prosecution has spent nearly a year and a half and several hundred thousands of dollars, I am told, on

a "fishing expedition" to bring more false charges against me that increased the pressure on my wife until, fearing for her life, I pleaded guilty to whatever crimes they wanted me to plead to, if they would leave her alone. They have not left her alone, even after I pled guilty.

I had the "Choice of 2 Evils" so I had to plead guilty I believe any man would have to plead guilty to anything to save the life of the woman he loves—I know I could not do less.

As of now, my wife is still being harassed, and in addition to all that she is now suffering such feelings of guilt, sorrow, despair, and remorse for my pleading guilty she is becoming sick, both physically and mentally, to such extent she has begged me to withdraw my false plea and tell the truth—I am innocent of the charges. We have talked and decided to throw ourselves on the goodness and mercy of this Court.

Wherefore, I pray in your wisdom you can see that I am an old, sick, dying man, that matters less my fate than concern for my wife's sake, that you will allow me to withdraw my false plea, made under the duress of evil, and allow me the opportunity to prove my innocence at trial of this matter, as law and justice should require.

I most respectfully submit our cause to you.

Dated: December 23, 1993.

Thank you,

/s/ Bob Hyde
ROBERT E. HYDE

Since I am imprisoned with no means to submit this motion in proper form I beg the Court to allow me to present memorandum, points and authorities later and ask the Clerk to please make the necessary copies and serve the interested parties. Thank you all & God bless you. Wishing you all a Merry Christmas and Happy New Year.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS

[March 15, 1994]

* * * *

[3] THE DEFENDANT: I'm sorry, Your Honor. What was that?

THE COURT: With respect to the guilty plea—

Let me ask you this: I do want to ask you, Mr. Hyde, in your motion to withdraw the guilty plea, you do not identify the person or persons who allegedly threatened your wife

Who are these people that you're [*sic*] refer to.

THE DEFENDANT: Your Honor, from the beginning, there was an FBI agent, Robert Schenke. Mr. Schenke has spent hours alone with my wife in her apartment, not only hounding her, but sexually harassing her and mentally raping her and driving her to the point of near insanity, in total fear for her life if she didn't get me to plead guilty to these false charges.

So I filed that complaint with the Federal Bureau of Investigation about Mr. Schenke's actions, not only against my wife, but also for his perjury in this case, Your Honor, originating in this case.

This case stems from a small business I had in 1987, which was duly licensed, and there were no complaints against the company or myself at the time that I sold the company. And four years later, when I had no longer seen the new owner, had no contact whatsoever during that four years, and there was an indictment that was

based upon the man who actually [4] bought the business—

THE COURT: I don't want to get into any of that. I just want to find out. As a basis for your requesting to withdraw your guilty plea, you have made a lot of assertions, but I didn't have any specific information.

THE DEFENDANT: Specifically, it's the FBI agent, Robert Schenke, told my wife that she would be arrested if I didn't plead guilty, if she didn't cooperate in every way with him.

THE COURT: You are saying these threats were made before you entered your guilty plea?

THE DEFENDANT: They had been made, yes. They have been made several times, Your Honor, along the way. Another thing—

THE COURT: Several times before you entered your guilty plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I did specifically question you about that when you entered your guilty plea, and you recall, if you do recall, when I asked you the question if you were pleading guilty to protect anyone or if anyone threatened you to get you to enter your guilty plea. My recollection is your answer to both those questions was no.

* * * * *

[6] THE DEFENDANT: That's true, Your Honor.

THE COURT: So why should I accept what you're saying today?

THE DEFENDANT: Because this is the truth.

THE COURT: How do I know which one is the truth?

THE DEFENDANT: Obviously, Your Honor, somebody doesn't pass up a deal for one count for five years and plead guilty to four counts for 30 years, unless there is something drastically wrong.

The night before I came here to go to trial I was informed I was going to be moved from the Federal Detention Center in Pleasanton down to Bryant Street, where I wouldn't have access to a law library, and we're going to make it a lot tougher for you and we're going to arrest your wife.

My wife has shown up in court everytime that I've come to court. She has done that in total fear and she has her daughter with her and is present in court right now, and she can verify, if you would like to put her under oath, that she has been sexually harassed here by Mr. Stepanian. She has been humiliated. She has been treated with the most violent vicious type of treatment from the FBI agent from the beginning all the way through to get me to plead guilty to these perjured charges that I can prove were perjured very easily with my witnesses at trial.

* * * * *

[34] THE DEFENDANT: I understand that.

THE COURT: That is your desire?

THE DEFENDANT: Sorry?

THE COURT: That is your desire?

THE DEFENDANT: Yes, it is.

THE COURT: Okay. Then your request is granted.

THE DEFENDANT: Sorry?

THE COURT: Your request is granted.

THE DEFENDANT: Thank you. I have one more, Your Honor. Since we only have the matter of sentencing left, that we waive the probation sentencing investigative report and ask for an immediate sentence.

THE COURT: Today?

THE DEFENDANT: Yes.

THE COURT: I'm not in a position to do that. First of all, I still have your motion outstanding.

Do you want to withdraw your motion.

THE DEFENDANT: I will withdraw my motion.

THE COURT: You want to withdraw your motion to withdraw your guilty plea?

THE DEFENDANT: There's no way I can satisfy the Court.

THE COURT: Well, that's your choice. I'm giving you a week. Whether you withdraw your motion to withdraw the guilty plea or not, I'm not inclined to sentence you today. I [35] don't generally sentence people without a presentence report. I find the information in a presentence report invaluable in making some of the decisions that I have to make, particularly when the exposure is as significant as yours. So I wouldn't be inclined.

You can still withdraw your motion if you want, and then the court—

THE DEFENDANT: I will withdraw it, but I would I ask you for the earliest possible sentencing date.

THE COURT: Have they started on the presentence report?

MR. LEVIN: He had started on it, but then he pretty much stopped pending the outcome of this. So we had a date of April 5th, but I don't think that is realistic.

THE COURT: Let's see how soon we can—well, April 5th is—

MR. LEVIN: That was the date that had been set. Mr. Carter, I think, was the probation officer.

THE COURT: That is quite a bit of time.

MR. LEVIN: Three weeks.

THE COURT: If he already started.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS

[June 2, 1994]

* * * * *

[7] THE COURT: Okay. I—I'll make the legal rulings when it's appropriate.

At this point—I set today's hearing—I don't have a lot of time. I have scheduled enough time for you to bring forth the evidence that you would like to present to the court, so the court could then evaluate the law in the context of the evidence.

Because what I have so far is an unsworn, unsigned statement that is of no value to the court.

So if you have a witness, or several witnesses that you want to elicit evidence from, then call your witnesses, so the court can then hear the evidence, and I can then consider whatever evidence you present, coupled with whatever evidence Mr. Levin presents, and then . . . apply the appropriate law, and I'll issue my order.

But at this juncture, if you have witnesses, why don't you call your first witness.

DEFENDANT HYDE: Well, Your Honor, I think that's moot in view of the fact that the court erroneously took this plea under 11(e)(1)(A).

THE COURT: All right.

Do you—do you want to call any witnesses today?

DEFENDANT HYDE: No, I think there—

[8] THE COURT: Because I—at this point—after I hear the evidence, if you have some comments that you would like to make with respect to the law, that's fine.

But I did schedule a court hearing today. If you have witnesses, call them.

DEFENDANT HYDE: Well, the witnesses to this matter—we've got two different pleas here. We've got—we've got (1)(A) and then we have (e).

So we have two different pleas. So this certainly makes the thing—

THE COURT: Are you saying you don't—you don't have any witnesses that you wish to call?

DEFENDANT HYDE: I—I'd say, Your Honor, that—that under these circumstances that . . . that's really a moot question. Coercion and breach here.

And we have here on the reporter's record when you took this plea under 11(e)(1)(A), which means I have a right to withdraw the plea anyway. It's not a (B) plea. It's (A).

And you took under it under (A), Your Honor. And here's the record (displaying documents), if you would care to look at it.

THE COURT: I don't recall anything—any agreement—

DEFENDANT HYDE Right here is the record, Your Honor.

[9] THE COURT: —That you would have a right to withdraw your plea.

DEFENDANT HYDE: Here the Court says: I think it's pursuant to 11(e)(1)(B), but I think it is 11(e)(1)(A). Let me check.

Mr. Levin says: It probably is (e)(1)(A).

So under (E)(1)(A) I'm entitled to withdraw the plea, Your Honor, as a matter of law.

In other words, the Court has really—maybe just—with all due respect, Your Honor, just didn't fulfill—in addition to that, you didn't fulfill the obligation of 11

(e)(2), which means you have to inform a defendant that he cannot withdraw his plea once he's given it.

And you did not inform me of that.

MR. LEVIN: Your Honor—

DEFENDANT HYDE: So either—either way we go, it's invalid.

MR. LEVIN: Your Honor, I think I could shed some light on that issue, although I don't know that the Court wants to even address it at this point.

THE COURT: You may if you like.

MR. LEVIN: The written plea agreement, as I recall, erroneously referred to it as a plea under 11(e)(1)(B).

That is, in which the Government agrees to make a specific recommendation.

[10] THE COURT: Right.

MR. LEVIN: And if a plea is taken under that section, then the Court is obliged to advise the defendant that he may not withdraw the plea, even if the Court does not go along with the recommendation.

But the Court observed during the course of taking the plea that there was no commitment by the Government to make any particular recommendation, so it was really a plea under 11(e)(1)(A); that is, to move for dismissal of other charges.

And given that, there was no obligation of the Court to advise Mr. Hyde that if the Court didn't impose a particular sentence he could withdraw the plea, because there was no commitment by the Government to recommend any particular sentence.

THE COURT: Well. . . .

DEFENDANT HYDE: But under that (A)—

THE COURT: In that case I would have not made a statement that you—that the Court is not obliged to follow the recommendation.

But I. . . . I certainly do not concur with your analysis of that section, Mr. Hyde.

DEFENDANT HYDE: It's right here in the reporter's—

THE COURT: So to the extent that I do not concur—I understand your argument. I don't concur.

If you have witnesses that you would like to call—[11] if so, call your first witness.

DEFENDANT HYDE: I will call my wife.

Can I get your ruling on the fact on 11(e)(2) that you did not inform me?

THE CLERK: Take the witness stand.

THE COURT: Whatever you want to file, Mr. Hyde, you file it. Today is the date for a hearing—

DEFENDANT HYDE: Uh-huh.

THE COURT: —on this motion. And I—which is what I'm going to have.

Any additional requests that you have, put them in writing; the Government will respond; and the Court will issue the appropriate order.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA

[Filed July 19, 1994]

On June 2, 1994, this Court conducted an evidentiary hearing on defendant's motion to withdraw his guilty plea. After having considered the papers submitted in connection with the motion and the testimony of the witnesses at the evidentiary hearing, the Court finds that defendant's motion should be denied.[1]

BACKGROUND

Defendant Elmer Hyde was charged with masterminding and operating a bogus loan brokerage scam. Defendant effected this scheme by holding himself out as a loan broker and president of a company known as the Money Brokers Association ("MBA"). Under the guise of the MBA, defendant would promise to obtain loans on behalf

[1] The Court notes that defendant filed a variety of "motions" subsequent to filing his motion to withdraw his guilty plea. Defendant has styled these submissions a Motion for Dismissal of All Charges in the Interests of Justice, Petition for a Writ of Habeas Corpus, Motion to Dismiss this Case in the Best Interests of Justice, and Motion to Withdraw Breached Guilty Plea. The crux of these motions is essentially the same—namely, that the defendant should be released because he did not commit the crimes charged in the Indictment. Because these motions are duplicative of the instant motion before the Court, each of these motions is denied.

of the prospective applicants in exchange for up-front application fees. Defendant Hyde accepted the fees despite never having arranged for the financing.

The Government charged the defendant with the following violations: (1) 18 U.S.C. § 1341—mail fraud (Counts 1, 4, 5); 18 U.S.C. § 1343—wire fraud (Counts 6, 7, 8); (3) 18 U.S.C. § 2315—receiving stolen property (Counts 2, 3); and (4) 18 U.S.C. § 2(b)—wilfully causing an offense against the United States (Counts 1-8). The core allegations are contained in Count I. The remaining Counts charge defendant with various statutory violations for conduct related to the scheme.

Trial was set to commence on November 29, 1993. On the first day of trial but prior to the commencement of any proceedings, the Government and the defendant informed the Court that they were in the process of negotiating a plea agreement. Later that same day, defendant pled guilty to Counts I through IV of the Indictment as part of a written plea agreement filed with the Court. Before taking the defendant's plea, the Court extensively voir dired defendant pursuant to Federal Rule of Criminal Procedure 11 to verify that his change of plea was knowing, voluntary and intelligent.

On December 23, 1993, defendant filed a motion to withdraw his guilty plea on the ground that he entered his plea under duress. Specifically, defendant claims that he feared for his wife's life based on threats of harm allegedly made by the prosecutor in this case, Assistant United States Attorney Joel Levin, and other identified Justice Department employees.

On March 15, 1994, the Court conducted a hearing on defendant's motion. Defendant appeared in Court pro se with Michael Stepanian, his Court-appointed standby counsel.[2] During the hearing, the Court informed de-

[2] Also set for hearing on this date was Defendant's Renewed Motion to Dismiss for Prejudicial Delay and Defendant's Ex Parte to Remove Assistant Counsel Michael Stepanian for Sexual Harass-

fendant that he had failed to present any cognizable evidence to support his claim that his plea was coerced or was otherwise the product of duress. The Court, however, permitted defendant until March 22, 1994, to allow Mrs. Carole Hyde, defendant's wife, to submit a sworn declaration setting forth the specific factual bases for his allegation that she had been harassed by the government.

Mrs. Hyde submitted her unsworn and unsigned declaration on March 21, 1994. In that declaration, Mrs. Hyde averred that Federal Bureau of Investigations Agent Robert Schenke ("Agent Schenke") came to her home in August 1993, and acted in a "menacing manner." (*See* Carole Hyde Decl. ¶ 3.) She alleges that he threatened her with arrest and made unspecified "threats" concerning her job. (*Id.*, ¶ 6.) Mrs. Hyde concludes that she "did influence [defendant] him to plea (sic) guilty because of [her] fears, he was concerned for [her] safety."

On April 7, 1994, after reviewing Mrs. Hyde's declaration, this Court scheduled an evidentiary hearing on defendant's motion. The Court's Order stated, in part:

> Mrs. Hyde's declaration is both vague and conclusory. Nevertheless, because there is some suggestion —however tenuous—that defendant entered his guilty plea under duress, it is important that the Court allow the parties to develop the requisite factual record from which the Court can determine, under the totality of the circumstances, whether plaintiff's plea was completely voluntary. *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986).

Order (filed April 7, 1994) at 2. The Court set the evidentiary hearing for April 26, 1994.

On April 19, 1994, one week prior to the date scheduled for the evidentiary hearing, defendant filed a document styled as a "Request for Court's Compulsory Processes (sic) to Obtain Witnesses for Evidentiary Hearing April 26, 1994." In this document, defendant requested that the Court issue subpoenas to compel the attendance of ten witnesses for the evidentiary hearing.[3] The Court liberally construed this request as one made under Federal Rule of Criminal Procedure 17, which governs the issuance of subpoenas in criminal cases. Because defendant failed to make the requisite proffer required under Rule 17, the Court denied defendant's request. *See* Order (filed April 26, 1994). The Court, however, granted defendant leave to file an amended Rule 17(b) request with the necessary information.[4] The Court also ordered defendant to provide information to show his financial inability to pay the fees of the witnesses. This additional information was due by May 12, 1994. The Court vacated the evidentiary hearing set for April 26, 1994, to allow defendant sufficient time to prepare his renewed Rule 17 request.

Defendant failed to file a renewed Rule 17 request. Thus, on May 13, 1994, this Court issued an Order rescheduling the evidentiary hearing for June 2, 1994. At the hearing, defendant presented the testimony of his wife, Carole Hyde, and his daughter, Crystal Hiddleston. The Government proffered Agent Schenke. The Court took the defendant's motion to withdraw his guilty plea under submission at the close of the evidentiary hearing.

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ment and Other Acts or Moral Turpitude. The Court denied the motion to dismiss but granted to motion to remove standby counsel.

[3] Included in defendant's list was Judge Patel of this Court, a Time magazine correspondent, and several federal prisoners.

[4] Specifically, the renewed Rule 17 request was to be accompanied by a written statement which indicated, for each witness: (a) the nature of the testimony to be elicited; (b) the relevance of such testimony to the issue of whether defendant's guilty plea was involuntary; and (c) an explanation of why the witness' testimony is necessary to the adjudication of the voluntariness issue.

DISCUSSION

A. *Legal Standard*

A defendant has no right to withdraw a guilty plea. *United States v. Castello*, 724 F.2d 813, 814 (9th Cir. 1984). Nevertheless, the Federal Rules of Criminal Procedure permit a defendant to withdraw a guilty plea prior to sentencing "upon a showing by the defendant of any fair and just reason." Fed. R. Civ. P. 32(d). The burden is on the defendant to present a "plausible reason for withdrawal." *United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980). A "change of heart" alone is insufficient. *United States v. Turner*, 898 F.2d 705, 713 (9th Cir. 1990). The court has "broad discretion" in deciding whether to allow the withdrawal of a guilty plea. *United States v. Rios-Ortiz*, 830 F.2d 1067, 1070 (9th Cir. 1987).

B. *There is No Evidence To Support Defendant's Claim of Coercion*

In the present case, defendant seeks to withdraw his guilty plea because he claims it was the product of duress. A guilty plea which is the result of coercion or duress is not voluntary, and hence, is invalid. *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986). In such cases, "[the] concern is not solely with the subjective state of mind of the defendant, but also with the constitutional acceptability of the external forces inducing the guilty plea." *Id.* While threats made against third parties are not per se coercive, they should be carefully considered by the Court in assessing the voluntariness of a plea. *See Castello*, 724 F.2d at 815. Thus, in determining voluntariness, the court looks to the "totality of the circumstances." *Iaea*, 800 F.2d at 866.

Here, defendant asserts that he was coerced into entering a guilty plea based on threats allegedly made against his wife by Agent Schenke. There is absolutely no

credible evidence to support this claim.[6] At the evidentiary hearing, Mrs. Hyde admitted that at no time did she advise the defendant to plead guilty on her account. She further testified that she had repeatedly urged the defendant *not* to plead guilty and that he should contest the charges in the indictment. In fact, Mrs. Hyde's last advice to the defendant was to plead not guilty.[6]

There is also no evidence that Agent Schenke improperly threatened or coerced Mrs. Hyde. Agent Schenke first made contact with Mrs. Hyde in August 1993, after the defendant had temporarily absconded. Agent Schenke visited Mrs. Hyde as part of his standard FBI investigation into the defendant's whereabouts. Although Mrs. Hyde testified that she felt "terrorized" and "harassed" by Agent Schenke's presence, there is no evidence that he made any threats against her other than to warn her that harboring a fugitive was illegal. In addition, Mrs. Hyde admitted on cross-examination that Agent Schenke never threatened her and that he told her there would be no problem so long as she cooperated in his investigation. In light of her in-court testimony, the Court finds that Mrs. Hyde's allegations of coercion are simply incredible.

In contrast to the paucity of evidence to support the alleged governmental coercion, defendant has repeatedly admitted his guilt while under oath. (*See* Application to Enter a Guilty Plea ¶¶ 5, 23.) Similarly, in the Application to Enter a Guilty Plea and the Plea Agreement (both filed on November 29, 1993), defendant represented to the Court that his decision to enter a guilty plea was not "forced or coerced by any threats or compulsion, direct or indirect, to [him] *or any other person.*" (*See* Applica-

---

[5] There was also no evidence of misconduct or coercive behavior by any other person.

[6] Defendant's claim that he pleaded guilty at the insistence of his wife is further undermined by Mrs. Hyde's testimony that she had *no contact* with him during the plea negotiations which took place on November 29, 1993.

tion to Enter a Guilty Plea ¶ 25; Plea Agreement ¶ 10.)

Moreover, prior to accepting the defendant's change of plea, the Court conducted an lengthy voir dire of the defendant pursuant to Federal Rule of Criminal Procedure 11 to confirm that his change of plea was completely voluntary and proper. During that voir dire, The Court specifically asked defendant whether his guilty plea was in any way coerced; the defendant responded it was not:

> THE COURT: Has anyone threatened you in any way to make or force you to enter a guilty plea?
>
> DEFENDANT: No, they haven't, your honor.
>
> THE COURT: Are you pleading guilty to protect anyone?
>
> DEFENDANT: No, I am not.

(Reporter's Transcript at 17:2-7.) The Court is entitled to credit defendant's testimony at the Rule 11 hearing over his subsequent testimony. *See Castello*, 724 F.2d at 815.

In an attempt to discount his prior admissions of guilt to the Court, defendant testified at the evidentiary hearing that he lied to the Court at the Rule 11 hearing because his wife "begged" him to plead guilty. As for explaining his statements in the Plea Agreement and the Application to Enter a Guilty Plea, defendant claims he did not read those documents and that he would have signed anything presented to him by the Government.[7] Because the Court finds that the defendant lacks any semblance of credibility, the Court places no weight in

[7] At the evidentiary hearing, defendant admitted that he was untruthful with the Court at the time he entered his guilty plea. Defendant claimed that his dishonesty was justified because, from his perspective, everyone "lies" in these types of proceedings, including the Court and the prosecutor. The Court finds that defendant's cavalier explanation exemplifies his disturbing and blatant disregard for the truth and evidences a complete lack of credibility.

these explanations. Accordingly, based on the totality of the circumstances, the Court finds that the defendant entered his guilty plea knowingly, voluntarily and intelligently.

C. *There Was No Error at the Rule 11 Hearing*

As the evidentiary hearing, defendant raised an issue concerning the propriety of the Court's Rule 11 voir dire. Specifically, he claimed that because the Plea Agreement was entered pursuant to Federal Rule of Criminal Procedure 11(e)(1)(B), the Court erred in not advising him that he had no right to withdraw his guilty plea.

Rule 11(e) sets forth the appropriate procedure for plea agreements. Under Rule 11(e)(1), the government may do any of the following in exchange for a plea of guilty or nolo contendere:

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.

Fed. R. Crim. P. 11(e)(1)(A)-(C). Rule 11(e)(2) provides that "[i]f the agreement is of the type specified in subdivision (e)(1)(B), the Court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea."

The instant Plea Agreement indicates that it is pursuant to Rule 11(e)(1)(B). However, counsel for the Government explained at the hearing that this was a typographical error, and that the Agreement should have indicated Rule 11(e)(1)(A). The Court has reviewed the Plea

Agreement and concurs with the Government. At paragraph 1 of the Plea Agreement, the Government expressly agreed to dismiss Count V through VIII of the Indictment in exchange for his guilty plea as to Counts I through IV. The Government also agreed that it would not bring any additional charges against the defendant based on his operation of or involvement in certain other fraudulent activities. (Plea Agreement ¶ 3.) There are no promises by the government in the Plea Agreement that it would make a recommendation, or agree not to oppose the defendant's request, for a particular sentence. Thus, the Court concludes that defendant's claim of error as a basis for withdrawing his guilty plea is without merit.

CONCLUSION

The record before the Court is devoid of any suggestion that defendant's guilty plea was in anyway coerced. Defendant's claim of coercion is nothing more than an attempt to avoid the consequences of his criminal conduct. Accordingly,

IT IS HEREBY ORDERED THAT:

(1) Defendant's motion to withdraw his guilty plea is DENIED.

(2) Defendant's Judgment and Sentencing shall take on October 4, 1994, at 1:30 p.m., in Courtroom 2 of the United States Courthouse, 450 Golden Gate Avenue, 17th Floor, San Francisco, California, 94102.

IT IS SO ORDERED.

DATED: July 18, 1994

/s/ Saundra B. Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Caption Omitted in Printing]

JUDGMENT IN A CRIMINAL CASE

[Filed Mar. 7, 1995]

THE DEFENDANT:

☒ pleaded guilty to count(s) ONE THRU FOUR OF THE INDICTMENT.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 1341 and 2(b)	Mail Fraud and Willfully Causing an Offense Against the United States	Sept. 13, 1988	One
18 U.S.C. §§ 2315 and 2(b)	Receiving Stolen Property and Willfully Causing an Offense Against the United States	Jan. 6, 1988	Two
18 U.S.C. §§ 2315 and 2(b)	Receiving Stolen Property and Willfully Causing an Offense Against the United States	Jan. 25, 1988	Three
18 U.S.C. §§ 1341 and 2(b)	Mail Fraud and Willfully Causing an Offense Against the United States	Feb. 3, 1988	Four

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Refrom Act of 1984.

☒ Count(s) FIVE THRU EIGHT OF THE INDICTMENT (are) dismissed on the motion of the United States.

☐ It is ordered that the defendant shall pay a special assessment of $200.00, for count(s) ONE THRU FOUR OF THE INDICTMENT, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, and speical assessments imposed by this judgment are fully paid.

Entered in Criminal Docket 3-7, 1995

Defendant's Soc. Sec. No.:
019-12-3419

Defendant's Date of Birth:
8-8-21

Defendant's Mailing Address:
U.S. Marshall Prisoner
#27907-048

Defendant's Residence Address:
Same as Above

February 28, 1996
Date of Imposition of Sentence

/s/ [Illegible]
Signature of Judicial Officer

SAUNDRA BROWN ARMSTRONG
U.S. District Judge
Name & Title of Judicial Officer

3-6-96
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty (30) months on each of Counts One through Four to be served concurrently.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. *The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions*:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☒ The defendant shall not possess a firearm or destructive device.

Defendant shall submit his person, place of residence or any vehicle under his control to a search by the U.S. Probation Officer at any time with or without a search warrant;

Defendant shall refrain from incurring new credit charges or opening additional lines of credit without the approval of the U.S. Probation Officer unless he is in compliance with the payment schedule established by the U.S. Probation Officer;

Defendant shall provide the U.S. Probation Officer with access to any requested financial information;

Defendant shall not occupy a position of financial trust or responsibility without the authorization of the U.S. Probation Officer;

Defendant shall pay any fine, restitution and special assessment imposed by this judgment as directed by the U.S. Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit his or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $5,000.00. The fine includes any costs of incarceration and/or supervision.

☒ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☒ The interest requirement is waived.

☒ in installments according to the following schedule of payments:

As directed by the U.S. Probation Officer

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
United States Attorney 450 Golden Gate Ave. San Francisco, CA 94124	$477,990.90

Payments of restitution are to be made to:

☒ the payee(s).

☒ in installments according to the following schedule of payments:

At the direction of the U.S. Probation Officer

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 17

Criminal History Category: I

Imprisonment Range: 24 to 30 months

Supervised Release Range: 2 to 3 years

Fine Range: $5,000.00 to $50,000.00

☐ Fine is waived or is below guideline range, because of the defendant's inability to pay.

Restitution: $477,990.00

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

SEE STATEMENT OF REASONS

☆ U. S. GOVERNMENT PRINTING OFFICE: 1997 417722 60001

(8)

No. 96-667

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General

MARK M RICHARD
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

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Washington, D.C. 20530-0001
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42pp

QUESTION PRESENTED

Whether a defendant has an absolute right to withdraw his guilty plea after the district court has accepted it but before the district court has decided whether to accept or reject an accompanying plea agreement.

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In the Supreme Court of the United States

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No. 96-667

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-5a) is reported at 82 F.3d 319. The order of the court of appeals (Pet. App. 6a-7a) amending the opinion and denying a petition for rehearing is reported at 92 F.3d 779. The order of the district court denying respondent's motion to withdraw his guilty plea (Pet. App. 8a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1996. A petition for rehearing was denied on July 29, 1996. Pet. App. 6a-7a. The petition for a writ of certiorari was filed on October 28, 1996, and was granted on January 17, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES AND GUIDELINES PROVISIONS INVOLVED

Rules 11 and 32 of the Federal Rules of Criminal Procedure and Sentencing Guidelines Section 6B1.1 are reproduced at App., *infra*, 1a-14a.

STATEMENT

1. On December 13, 1991, a grand jury in the Northern District of California returned an indictment (J.A. 5-13) charging respondent as principal and as accessory with three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of wire fraud, in violation of 18 U.S.C. 1343; and two counts of receiving stolen property, in violation of 18 U.S.C. 2315. The charges arose from a bogus loan brokerage scheme, under which respondent would allegedly promise to obtain loans on behalf of his victims, in return for their payment of up-front application fees. Although the victims paid the fees, respondent allegedly failed to arrange for the loans. Pet. App. 9a.

2. On November 29, 1993, the date set for the commencement of trial, respondent and the government entered into a written plea agreement. J.A. 21-27. That agreement provided that respondent would plead guilty to two of the mail fraud counts and to the two counts charging receipt of stolen property. J.A. 21. The agreement also provided that the government would move to dismiss the remaining four counts with which respondent was charged, *ibid.*, and would not bring further charges based on respondent's participation in the loan brokerage scheme or based on certain other past activities of respondent, J.A. 22-23. Finally, the agreement stated that respondent and the government agreed on a number of details concerning the application of the Sentencing Guidelines to this case and the calculation of the amount of restitution

that should be ordered. J.A. 23-24. The agreement recognized, however, that "[t]he district court will be free to make its own determinations pursuant to the Guidelines" and it stated that "[t]he defendant understands that the final decision as to which Guidelines apply rests with the court." J.A. 25.

That same afternoon, respondent pleaded guilty in open court to the four counts specified in the plea agreement. See J.A. 28-55. In conducting the colloquy required by Federal Rule of Criminal Procedure 11 for the taking of a guilty plea, the court addressed respondent and ascertained that respondent knew the nature of the charges and possible punishment, that respondent was willing to waive his various trial rights by virtue of his guilty plea, and that respondent's plea was knowing and voluntary. J.A. 34-52. The court also ascertained that respondent understood the plea agreement, the obligations it imposed on each party, and the continuing final authority of the court to determine an appropriate sentence in accord with the Sentencing Guidelines. J.A. 40-42.

Of particular relevance to this case, the court informed respondent that "I may accept or reject [the plea] agreement today, or I may reserve ruling to accept or reject the plea agreement pending completion of the presentence report." J.A. 41. The court asked respondent to state in his own words what he had done that led him to plead guilty to each of the four counts. The court also asked the government to set forth the factual basis for each charge, and the court confirmed that respondent agreed with the government's statements about the offenses. J.A. 42-50. The court asked respondent whether he had

committed the crimes charged, and respondent replied "Yes, Your Honor, I did." J.A. 51.

The court then reviewed the maximum sentences that could be imposed, J.A. 51-52, and the court ascertained that respondent had no objection to the advice he had received from his advisory counsel, J.A. 53. Finally, the court inquired how respondent pleaded to each of the four counts. With respect to each count, respondent answered, "Guilty, Your Honor." J.A. 53-54. The district court said, "The Court accepts the guilty plea." J.A. 54. The court also stated that it "reserves ruling on whether to accept the plea agreement pending completion of the presentence report." *Ibid.* The court filed a written order providing "that [respondent's] plea of 'GUILTY' be accepted." J.A. 20.

3. On December 23, 1993, respondent filed a motion pursuant to Federal Rule of Criminal Procedure 32(e) to withdraw his guilty plea on grounds of duress, claiming that the prosecutor and other Department of Justice officials had threatened harm to his wife. J.A. 56-57.[1] There followed a series of proceedings, including a hearing at which respondent failed to present evidence supporting his claim, see Pet. App. 10a; J.A. 58-61; respondent's submission of a "vague

[1] The caption of the motion indicated that it was filed "pursuant to F.R.C.P. Rule 32(d)." See J.A. 56. In January 1994, when respondent's motion was filed, the rule governing withdrawal of guilty pleas was codified as Rule 32(d). It was recodified as Rule 32(e) when Rule 32 was amended in 1994. Both before and after that change in designation, the rule provided in relevant part: "If a motion to withdraw a plea of guilty * * * is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason."

and conclusory" unsigned, unsworn statement by respondent's wife, see Pet. App. 11a; and an evidentiary hearing at which respondent introduced the testimony of his wife and daughter, and the government introduced the testimony of the FBI agent who was alleged to have threatened respondent's wife, see Pet. App. 12a; J.A. 62-65.

On July 19, 1994, the court issued a memorandum and order denying respondent's motion to withdraw his plea. Pet. App. 8a-18a. The court noted that, under Federal Rule of Criminal Procedure 32, a defendant may withdraw a guilty plea before sentencing "upon a showing by the defendant of any fair and just reason." See Pet. App. 12a. In this case, the court held, "[t]here is absolutely no credible evidence to support [respondent's] claim" of duress. *Id.* at 13a. The court also found that "[t]here is * * * no evidence that [the FBI agent] improperly threatened or coerced [respondent's wife]." *Id.* at 14a. Finding that "[respondent] lacks any semblance of credibility," *id.* at 16a, the court ruled "that [respondent] entered his guilty plea knowingly, voluntarily and intelligently." *Ibid.* The court also rejected respondent's claim that the court had committed error under Rule 11 at the guilty plea hearing. *Id.* at 16a-17a.

The court subsequently sentenced respondent to 30 months' imprisonment, to be followed by three years' supervised release, and ordered that he make restitution in the amount of approximately $477,990. J.A. 75-80.

4. The court of appeals reversed. The court held that the requirement of Federal Rule of Criminal Procedure 32(e) of a "fair and just reason" for withdrawing a plea of guilty was inapplicable in this case.

The court observed that "when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the court must permit the withdrawal." Pet. App. 2a. The court noted respondent first moved to withdraw the plea almost a month after the court had accepted it, but concluded that that fact was irrelevant, because the district court had not yet accepted the plea agreement. The court explained that

> [t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated that it accepted [the] plea.

Id. at 3a (quoting *United States* v. *Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, 117 S. Ct. 113 (1996)). The court concluded that

> [i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire.

Pet. App. 4a. The court therefore reversed respondent's conviction "so that he can plead anew." *Ibid.*

Judge Ferguson filed a brief concurring opinion (Pet. App. 5a), in which he stated that while he disagreed with the result, he believed that it followed from the Ninth Circuit's decision in *United States* v. *Cordova-Perez*.

SUMMARY OF ARGUMENT

Under the Federal Rules of Criminal Procedure, a guilty plea must be tendered personally by a defendant in open court and a court must follow careful procedures before deciding whether to accept the guilty plea. Once the district court has accepted a guilty plea, the Rules contain two provisions governing withdrawal of the plea before sentencing. Under Rule 32(e), a defendant may withdraw a guilty plea on a showing of a "fair and just reason." Under Rule 11(e)(4), a defendant has an absolute option to withdraw a guilty plea if the district court has rejected an accompanying plea agreement. The district court in this case correctly found that respondent's request to withdraw his guilty plea satisfied neither of those standards; respondent proffered no "fair and just reason," and the district court had not rejected the plea agreement.

The Ninth Circuit did not disagree with the district court's findings that respondent failed to satisfy the standards of Rule 32(e) and Rule 11(e)(4). The court's determination that respondent should nonetheless be permitted freely to withdraw his guilty plea—"for any reason or for no reason"—therefore conflicts with the explicit provisions, as well as the underlying policies, of both Rules.

The court of appeals attempted to justify its rule of free withdrawal from guilty pleas on the ground that such a rule is justified where the district court has never really accepted the plea in the first place. In the Ninth Circuit's view, the district court's apparent acceptance of the guilty plea in this case must be disregarded because the district court at the same

time deferred decision on whether to accept the accompanying plea agreement.

There is no legal basis for the court of appeals' holding that a district court's acceptance of a guilty plea must be disregarded until such time as the district court has accepted an accompanying plea agreement. The Federal Rules nowhere condition the court's acceptance of a guilty plea on its acceptance of an accompanying plea agreement. Rather, the Rules expressly provide that courts may accept guilty pleas when tendered while deferring decision on whether to accept or reject an accompanying plea agreement. A court may not disregard the Rules on the ground of a perceived injustice, but, in any event, there is nothing unjust about holding a defendant to his guilty plea in the absence of a "fair and just reason."

The Ninth Circuit's rule of free withdrawal would encourage gamesmanship by defendants seeking to delay their trial. In addition, by converting a defendant's confession to a crime and guilty plea into a statement revocable at will for a period of months after it has been tendered and accepted in open court, the court of appeals' rule reduces respect for judicial proceedings and for the rule of law.

ARGUMENT

A DEFENDANT HAS NO RIGHT TO WITHDRAW A GUILTY PLEA AFTER THE DISTRICT COURT HAS ACCEPTED IT ABSENT THE SHOWING OF A FAIR AND JUST REASON OR THE REJECTION OF AN ACCOMPANYING PLEA AGREEMENT

The Ninth Circuit held that a defendant who has pleaded guilty to a crime, but who has also entered into a plea agreement, may withdraw his guilty plea for any reason—or for no reason at all—at any time

before the court's acceptance of the plea agreement. In most circumstances, district courts postpone a decision whether to accept a plea agreement until a presentence report has been prepared and the court has had the opportunity to review it. Accordingly, under the Ninth Circuit's ruling, a knowing and voluntary guilty plea made with full procedural safeguards and due formality in open court amounts merely to a statement by the defendant that he may or may not have committed the crime and that he may or may not demand a trial on the charges against him; the guilty plea has no binding effect whatsoever for a prolonged period, until a presentence report has been prepared, objections have been made, and the court has determined whether to accept the plea agreement.

The Ninth Circuit's rule is contrary to express provisions of the Federal Rules of Criminal Procedure, and it threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases. Accordingly, it should be reversed.

A. The Federal Rules of Criminal Procedure Narrowly Limit The Circumstances Under Which A Guilty Plea, Once Accepted By A Court, May Be Withdrawn

1. Rule 11 of the Federal Rules of Criminal Procedure contains a set of detailed requirements that must accompany the entry and acceptance of a guilty plea. The rule provides that, "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," a number of crucial facts. Fed. R. Crim. P. 11(c). Those include the nature of the charge, the

maximum and minimum penalties to which the defendant will be subject, and the defendant's rights to representation by an attorney at every stage of the proceeding, to trial by jury, to confront and cross-examine witnesses, and to the privilege against compelled self-incrimination. *Ibid.* The court must also ensure, "by addressing the defendant personally in open court," that the defendant's plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d). In addition, the court "should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f).

Rule 11's detailed procedures for entering a valid guilty plea reflect the fact "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). As *Brady* explained, "[c]entral to the plea * * * is the defendant's admission in open court that he committed the acts charged in the indictment." *Ibid.* The procedures required for entry and acceptance of a guilty plea are therefore designed to ensure that the defendant knows precisely the significance and consequences of making that admission. Where the proper procedures are followed and where the defendant has publicly admitted to having committed the offense charged, the defendant's admission is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975).

2. Rule 11 also provides for plea agreements and for their acceptance. Such agreements may contain

promises that the government will take three sorts of actions:

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.

Fed. R. Crim. P. 11(e)(1). The Rule differentiates the treatment of plea agreements that provide for the dismissal of charges or the imposition of a specific sentence (agreements under subdivisions (A) and (C) above) from plea agreements that provide only for nonbinding recommendations as to the sentence (agreements under subdivision (B) above). The Rule also specifies what options are available to a defendant if a court, after having accepted a guilty plea, later rejects an accompanying charge-dismissal or specific-sentence agreement.

a. Rule 11 expressly provides for the district court to defer its decision whether to accept a Rule 11(e)(1)(A) or Rule 11(e)(1)(C) plea agreement—*i.e.*, an agreement providing for dismissal of charges or imposition of a specific sentence. In the case of such agreements, "the court may accept or reject the agreement, *or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.*" Fed. R. Crim. P. 11(e)(2) (emphasis added). The primary purpose of permitting such deferral is to allow time for the preparation of a presentence report and its review

by the district court. The court may thereby review the detailed factual information ordinarily included in the presentence report and ensure that the dismissal of the charges or the imposition of a particular sentence in accordance with the agreement is consistent with the public interest in the just disposition of criminal charges. The Sentencing Guidelines generally require the district court to defer its decision on a charge-dismissal or specific-sentence plea agreement. See Sentencing Guidelines § 6B1.1(c) ("The court shall defer its decision * * * to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report.").[2] That requirement enables the court to ensure that such a plea agreement contemplates appropriate treatment of the defendant under the Guidelines, so that the agreement does not impair the Guidelines' purpose of preventing unwarranted disparities in sentencing. See, *e.g.*, 28 U.S.C. 994(f); *Mistretta* v. *United States*, 488 U.S. 361, 366-367 (1989).

Rule 11 also states what happens when the court accepts or rejects a charge-dismissal or a specific-sentence agreement. Under Rule 11(e)(3), "[i]f the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." On the other hand, under Rule 11(e)(4), "[i]f the court rejects the plea agreement, the court shall * * * inform the parties * * * that the court is not bound by the plea agreement [and] afford the defendant the opportunity to then withdraw the plea." The Rule adds that the court must "advise the defendant that if the defendant persists in a guilty plea * * * the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." *Ibid.* Thus, once a court rejects an agreement on which the defendant relied in pleading guilty, the defendant may—based on his own assessment of the risks and benefits—either adhere to the plea or withdraw from it and go to trial. See *United States* v. *Ellison*, 798 F.2d 1102, 1105 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987).[3]

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[2] Sentencing Guidelines Section 6B1.1(c) provides an exception for cases where "a [presentence] report is not required under § 6A1.1." Sentencing Guidelines Section 6A1.1 in turn provides that "[a] probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record." Under this provision, presentence reports are required in the vast majority of federal criminal cases.

[3] The Rules treat plea agreements that provide only for nonbinding recommendations concerning what sentence to impose—agreements made under Rule 11(e)(1)(B)—differently from agreements providing for dismissal of charges or imposition of a definite sentence. In the case of such a recommended-sentence agreement, the parties have expressly agreed "that such recommendation or request shall not be binding upon the court." Fed. R. Crim. P. 11(e)(1)(B). Because the agreement does not purport to commit the court to taking any particular action, a court would have no reason to reject such an agreement—though it may of course choose not to follow the nonbinding sentencing recommendation embodied in the agreement. Nor would the defendant be able to claim that he relied on imposition of any particular sentence in entering into the agreement and tendering his guilty plea. Accordingly, the Rules provide that in the case of such an agreement, "the court shall advise the defendant that if the court does not accept the

3. Rule 11(e)(4)'s provision for withdrawal of a guilty plea at the defendant's option when the court rejects an accompanying plea agreement states the only circumstance in which the defendant may unilaterally withdraw a plea. Any other request to withdraw an accepted plea must satisfy the requirements of Rule 32(e). That Rule provides: "If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Fed. R. Crim. P. 32(e). See also *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927) (pre-Rules use of "fair and just reason" standard).

Rule 32(e) grants a district court limited authority to permit withdrawals of a guilty plea at any time "before sentence is imposed." Fed. R. Crim. P. 32(e). It "does not provide an absolute right to withdraw a plea"; rather "[t]he defendant has the burden of proving that withdrawal is justified." *United States* v. *Moore*, 37 F.3d 169, 172 (5th Cir. 1994); see, *e.g.*, *United States* v. *Boone*, 869 F.2d 1089, 1091 (8th Cir.), cert. denied, 493 U.S. 822 (1989); *Government of Virgin Islands* v. *Berry*, 631 F.2d 214, 219-220 (3d Cir. 1980) (earlier version of Rule 32(e)); see also Amendments to Rules, 97 F.R.D. 245, 312 (1983). The defendant's withdrawal "must rest on something more than the defendant's second thoughts about some fact or point of law, or about the wisdom of his earlier decision." *United States* v. *Parrilla-Tirado*, 22 F.3d 368, 371 (1st Cir. 1994) (citations omitted).

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recommendation or request [as to sentencing] the defendant nevertheless has no right to withdraw the plea." Fed. R. Crim. P. 11(e)(2).

Where the defendant has made a showing sufficient to satisfy that standard, however, relief from the guilty plea is authorized. See, *e.g.*, *United States* v. *Martinez-Molina*, 64 F.3d 719, 733-734 (1st Cir. 1995); *United States* v. *Groll*, 992 F.2d 755 (7th Cir. 1993); *United States* v. *Syal*, 963 F.2d 900 (6th Cir. 1992). Otherwise, a duly accepted guilty plea should stand.

B. The Ninth Circuit's Rule Permitting Respondent To Withdraw His Guilty Plea "For Any Reason Or For No Reason" Is Inconsistent With Rules 11 and 32

The Ninth Circuit's rule permitting a defendant freely to withdraw a guilty plea at any time before the court accepts an accompanying plea agreement is inconsistent with the carefully drafted provisions of the Federal Rules of Criminal Procedure set forth above. Under those provisions, "once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea only in two ways relevant here, either by showing a fair and just reason under Rule 32[(e)], or by withdrawing under Rule 11(e)(4) after a rejected plea agreement." *United States* v. *Ewing*, 957 F.2d 115, 119 (4th Cir.), cert. denied, 505 U.S. 1210 (1992); see also *Ellison*, 798 F.2d at 1104-1105. Because respondent did not "show[] a fair and just reason" and the district court did not reject the plea agreement, the Ninth Circuit erred in holding that respondent may simply repudiate his guilty plea.

The Ninth Circuit attempted to justify its rule based on two propositions. First, the court stated that a defendant is free to withdraw his guilty plea before the district court has accepted it. Second, the court stated that "[t]he plea agreement and the plea are 'inextricably bound up together' such that the

deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea." Pet. App. 3a. Putting those two propositions together, the court of appeals concluded that a defendant is free to withdraw his guilty plea until the district court has accepted the plea agreement.

We assume for present purposes that the court of appeals' first premise is correct: Until the district court accepts a guilty plea, the defendant is free to withdraw it. See *United States* v. *Washman*, 66 F.3d 210, 212-213 (9th Cir. 1995). The court of appeals clearly erred, however, in holding that, when a district court defers a decision regarding whether to accept a plea agreement, it necessarily also defers a decision regarding whether to accept a guilty plea. That holding is without foundation and threatens to inject instability into the resolution of criminal cases through guilty pleas.

1. The court of appeals' holding that the district court necessarily deferred its decision whether to accept respondent's guilty plea when it deferred decision on the plea agreement is directly contrary to what the district court actually did. At the guilty plea hearing on November 29, 1993, the district court complied with all of the requirements of Rule 11. At the completion of the colloquy with respondent, the court stated: *"The court accepts the guilty plea.* The court reserves ruling on whether to accept the plea agreement pending completion of the presentence report." J.A. 54 (emphasis added). Moreover, on the same day, the court filed a written "Order Accepting Guilty Plea." J.A. 20. The Order recited that respondent had entered his plea "freely and voluntarily," that respondent "understands and knowingly * * *

waives his/her Constitutional rights," that respondent "freely and voluntarily" applied to enter a guilty plea, and that respondent "has admitted the essential elements of the crime charged." *Ibid.* The Order then stated: "IT IS THEREFORE ORDERED that [respondent's] plea of 'GUILTY' be accepted and entered as prayed for." *Ibid.* On this record, there is no room for ambiguity regarding the district court's acceptance of respondent's guilty plea.[4]

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[4] The plea agreement in this case recited that it was being entered into pursuant to Rule 11(e)(1)(B). See J.A. 21. That, however, appears to have been an error. Although the agreement did contain certain provisions regarding how the parties believed that the Guidelines should be applied in this case, J.A. 23-24, the agreement did not contain a recommendation regarding the ultimate sentence to be imposed, which is the hallmark of a Rule 11(e)(1)(B) agreement. And because the agreement did provide for the government to dismiss certain charges, it was appropriately viewed as a Rule 11(e)(1)(A) agreement. See J.A. 21; see also Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1979 Amendments. Noting these characteristics of the agreement, the district court at the plea hearing stated that it should be classified as a Rule 11(e)(1)(A) agreement. J.A. 41. The government agreed, without objection from respondent. *Ibid.*

Even if the district court erred in classifying the plea agreement under Rule 11(e)(1)(A), that would be of no consequence in this case. The only difference in the treatment of a charge-dismissal agreement under Rule 11(e)(1)(A) and a recommended-sentence agreement under Rule 11(e)(1)(B) is that, if the court rejects a charge-dismissal agreement, the defendant may freely withdraw his plea of guilty, while the defendant has no such right to withdraw his plea after entering into a Rule 11(e)(1)(B) agreement. Because the district court did not reject any portion of the plea agreement in this case, the classification of the agreement could have made no difference regarding respondent's right to withdraw his guilty plea.

2. The court of appeals did not maintain that the district court had actually deferred its acceptance of respondent's guilty plea. Rather, the court of appeals adopted a counterfactual principle of law that posits that whenever a district court postpones acceptance of a plea agreement, it necessarily defers its decision whether to accept the underlying guilty plea. See Pet. App. 3a. That principle, however, is entirely unfounded.

First, as noted above, there is nothing in the Federal Rules of Criminal Procedure that prohibits a district court from accepting a guilty plea before the district court has decided whether to accept a plea agreement. Rule 11 does impose certain requirements on the district court before it may accept a guilty plea. It provides that, "*[b]efore accepting a plea of guilty* * * *, the court must address the defendant personally in open court" and determine that the defendant understands the facts, the law, and the rights he is waiving. Fed. R. Crim. P. 11(c) (emphasis added). The Rule also provides that "*[t]he court shall not accept a plea of guilty* * * * *without first* * * * *determining* that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d) (emphasis added). The Rule also specifically envisions that the absence of a factual basis does not vitiate the district court's ability to accept a plea, though it does preclude the district court from entering judgment on it. See Fed. R. Crim. P. 11(f) ("*Notwithstanding the acceptance of a plea of guilty*, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.") (emphasis added). And a separate subdivision of Rule 11 governs

plea agreement procedure, with the express provision that a court may defer its acceptance or rejection of the plea *agreement* pending consideration of the presentence report. Fed. R. Crim. P. 11(e)(2). There is no parallel provision in Rule 11 requiring simultaneous deferral of acceptance or rejection of the *guilty plea*.

Rule 11 therefore carefully sets forth what is (and, in one instance, what is not) required before a court may validly accept a guilty plea. None of those provisions prohibits a court from accepting a guilty plea until it also accepts an accompanying plea agreement. Nor can any of those provisions reasonably be read to imply such a prohibition. Indeed, the provision of Rule 11(e)(4) granting a defendant an express right freely to withdraw a guilty plea if the court rejects an accompanying plea agreement would make little sense unless it is assumed that, at the time the court rejects the plea agreement, the defendant would be otherwise bound by a guilty plea that had already been properly accepted by the court.

Second, a court may not disregard the Federal Rules of Criminal Procedure even if the court believes they lead to an unfair or unjust result. See *Carlisle* v. *United States*, 116 S. Ct. 1460, 1466 (1996) (court may not "develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure"); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). But, in any event, the provisions at issue in this case are fair and reasonable. No defendant is required to plead guilty. Rule 32(e) in plain terms informs all participants that a guilty plea, once accepted by the court, may be withdrawn before sentencing only on a showing of a "fair and just reason." Consequently, if a defendant confesses to

his crime in open court at his plea proceeding, there is no injustice in holding the defendant to the consequences of his action. Indeed, the Rules' emphasis on the binding nature of the guilty plea has the salutary effect of reminding the defendant that a guilty plea should not be entered into lightly with the expectation that it may be retracted if and when the defendant has second thoughts. By contrast, the rule of free withdrawal from a guilty plea adopted by the Ninth Circuit would encourage an uncommitted defendant to enter a guilty plea and convince a district court to accept it, secure in the knowledge that the defendant will have a substantial period of time to repudiate his decision with no risk or cost.

Third, the only rationale for adopting a rule that a court may not accept a guilty plea until it has accepted an accompanying plea agreement would be the view that a defendant should have the opportunity to review the presentence report—and thereby gain a preview into his likely sentence—before finally committing himself to his plea. But that rationale has been squarely rejected by the Federal Rules in cases where the defendant has been unable to obtain a Rule 11(e)(1)(C) specific-sentence plea agreements. See *United States* v. *Horne*, 987 F.2d 833, 838 (D.C. Cir.), cert. denied, 510 U.S. 852 (1993); *United States* v. *Ludwig*, 972 F.2d 948, 951 (8th Cir. 1992); *United States* v. *Jackson*, 983 F.2d 757, 770 (7th Cir. 1993). All defendants who want to plead guilty must first be informed of the maximum possible sentence they face if their plea is accepted. See Fed. R. Crim. P. 11(c)(1). If a defendant who has obtained only a charge-dismissal agreement is willing to plead guilty knowing that that maximum sentence may be imposed, any sentence less than or equal to the

maximum can give him no reasonable ground for complaint.

3. Quite apart from the fact that the Ninth Circuit's rule conflicts with the Federal Rules of Criminal Procedure, precluding a court from accepting a guilty plea before the court has decided whether to accept a plea agreement would have serious adverse practical consequences. That rule encourages defendants to engage in manipulation and gamesmanship. For example, a defendant may delay a trial several months or longer—and put the government and the court to the substantial expense of needless trial preparation and needless preparation and review of a presentence report—simply by entering into a plea agreement and guilty plea on the eve of trial and then withdrawing his plea just before sentencing. Procedural rules should not be framed to permit that sort of manipulation.

The gap in Rule 32(e) opened by the Ninth Circuit's rule is a large one. Rule 32(e)'s "fair and just reason" standard applies "before sentence is imposed"—*i.e.*, during the time between the entry of a guilty plea and the time sentence is imposed. The Ninth Circuit's competing rule of free withdrawal would, however, apply to any case in which (a) the court has accepted a guilty plea at the Rule 11 plea proceeding, and (b) the court has deferred accepting an accompanying plea agreement until it has had the opportunity to review the presentence report.[5] District courts generally

[5] The vast majority of pleas of guilty in federal court are accompanied by plea agreements. See Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1974 Amendments ("guilty pleas account for the disposition of as many as 95% of all criminal cases," and "[a] substantial number of these are the result of plea discussions"); see also *Blackledge* v. *Allison*, 431

accept guilty pleas at the Rule 11 proceeding, so that preparation of the presentence report may be commenced and preparation for trial ended. And, as discussed above, see pp. 12-13, *supra*, courts ordinarily defer decision on whether to accept the plea agreement until they can review the presentence report.[6] Thus, the net effect of the Ninth Circuit's rule would be to displace Rule 32(e)'s "fair and just

U.S. 63, 71 (1977) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system"); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions * * * leads to prompt and largely final disposition of most criminal cases.").

[6] Under Federal Rule of Criminal Procedure 32(b)(6)(C), the presentence report must be submitted to the court for its review "not later than 7 days before the sentencing hearing." Before that time, the probation office must gather detailed "information about the defendant's history and characteristics, including any prior criminal record, financial, condition, and any circumstances that * * * may be helpful in imposing sentence" and "an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed." Fed. R. Crim. P. 32(b)(4)(A) and (D). In addition, the presentence report must ordinarily be furnished to the defendant and the government not later than 35 days before the sentencing hearing, Fed. R. Crim. P. 32(b)(6)(A), the parties must make whatever objections they have to the report not later than 14 days before the sentencing hearing, Fed. R. Crim. P. 32(b)(6)(B), and the probation officer must then conduct any further investigation and prepare whatever addenda to the report are appropriate, Fed. R. Crim. P. 32(b)(6)(B). Accordingly, there is often a substantial period between the time the defendant pleads guilty and the time when the presentence report is furnished to the court, and the court frequently is in a position to review the presentence report and determine whether to accept the plea agreement only at or very near the time of sentencing.

reason" standard in most cases from the time of entry of the guilty plea until the presentence report is prepared, at or near sentencing—*i.e.*, in most cases during virtually the entire period of time in which the "fair and just reason" standard was intended to be operative.

In addition, the court of appeals' decision reduces respect for judicial proceedings. It converts the defendant's solemn confession of guilt, made in open court during a guilty plea proceeding, into a statement that is revocable at will and that in most cases will have no legal effect unless and until the defendant later decides that it is advantageous to adhere to it. As the Advisory Committee commented when it added the "fair and just reason" standard to Rule 32(e), "[g]iven the great care with which pleas are taken under th[e] revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence." 97 F.R.D. at 313.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS AND RULES

1. Rule 11 of the Federal Rules of Criminal Procedure provides:

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided

by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on

the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea disussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo

contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

2. Rule 32 of the Federal Rules of Criminal Procedure provides:

Rule 32. Sentence and Judgment

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) When Made. The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

(2) Presentence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) Contents of the Presentence Report. The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer 's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(G) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer

not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence

(1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) Production of Statements at Sentencing Hearing. Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) Imposition of Sentence. Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that informa-

tion available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(d) Judgment

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered according. The judgment must be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of criminal forfeiture the judgment must authorize the Attorney General to seize the

interest or property subject to forfeiture on terms that the court consider proper.

(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule—

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocation under subdivision (c)(3)(E) may be exercised instead by—

(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

(B) One or more family members or relatives designated by the court if the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use of attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.

3. Sentencing Guidelines § 6B1.1 provides, in pertinent part:

§ 6B1.1. PLEA AGREEMENT PROCEDURE (POLICY STATEMENT)

(a) If the parties have reached a plea agreement, the court shall, on the record, require

disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.

Commentary

This provision parallels the procedural requirements of Rule 11(e), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to

accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by § 6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report.

(6)

No. 96-667

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT E. HYDE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the district court can accept a criminal defendant's tendered guilty plea, thus binding the defendant to the plea, without first, or simultaneously, accepting the plea agreement upon which the plea depends.

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The published decision of the United States Court of Appeals for the Ninth Circuit was filed on April 30, 1996, and was initially reported at 82 F.3d 319. As amended and superseded on denial of rehearing the opinion is republished at 92 F.3d 779. Petition for Writ of Certiorari ("Pet.") App. 1a-7a. The district court's unpublished order denying respondent's motion to withdraw was filed on July 19, 1994. Pet. App. 8a-18a.

RULES INVOLVED

Rules 11 and 32 of the Federal Rules of Criminal Procedure and Section 6B1.1, p.s., of the United States Sentencing Guidelines are involved in this case, and are reproduced as an appendix to petitioner's brief on the merits. Pet. Brf. 1a-14a. Relevant portions of the 1966 and 1975 texts of Rules 11 and 32, and the Notes of the Advisory Committee on Rules regarding the 1974 Amendments of those rules, are appended to this brief at App. 1-10.

STATEMENT OF THE CASE

Respondent's direct appeal followed a guilty plea on federal criminal charges alleging mail and wire fraud and arose out of his conviction and the 30-month sentence imposed under the Sentencing Guidelines.

An eight-count indictment, filed in the Northern District of California on December 13, 1991, charged respondent with three counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts One, Four and Five); two counts of receipt of stolen property which had crossed a state boundary, in violation of 18 U.S.C. § 2315 (Counts Two and Three); and three counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts Six, Seven and Eight). J.A. 5-13.

On November 29, 1993, respondent entered into a plea agreement with the prosecutor and tendered a guilty plea to two counts of wire fraud (Counts One and Four) and two counts of receipt of stolen property (Counts Two and Three). J.A. 53-54. The district court, however, deferred acceptance of the plea agreement until after review of the Presentence Report. J.A. 54.

Pursuant to the plea agreement and in exchange for respondent's guilty pleas to Counts One through Four, the government agreed to move to dismiss Counts Five through Eight of the indictment and not to bring further charges against respondent in connection with his involvement with two loan brokerage firms. J.A. 21-22. The government also stipulated to sentencing calculations for respondent's base offense level, the grouping of offenses, role enhancement, and respondent's adjusted offense level. J.A. 23-24. The agreement also provided how restitution would be calculated. J.A. 24. Finally, the parties agreed the sentencing stipulations were not binding on the district judge: "The district court will be free to make its own determinations pursuant to the Guidelines as to the appropriate sentence to be imposed." J.A. 25.

The agreement stated that it was made under Federal Rule of Criminal Procedures 11(e)(1)(B).[1] J.A. 21. As the agreement required that the government dismiss charges, it was also a Rule 11(e)(1)(A) agreement.

On December 23, 1993, less than a month after the change of plea hearing and before having seen his presentence report, respondent moved to withdraw his guilty plea on the grounds both that the agreement was made under duress and that the district court failed properly to advise him of the consequence of his plea, as required by Fed. R. Crim. P. 11(e)(2). J.A. 56-57. The district court held an evidentiary hearing on June 2, 1994, and denied the motion to withdraw the guilty plea in a written order dated July 19, 1994, finding that respondent had failed to show that his guilty plea was coerced. J.A. 6, 70-73.

On February 28, 1995, the district court sentenced respondent to a 30-month term of imprisonment consisting of concurrent 30-month terms on each of Counts One through Four. J.A. 75-76.[2] On March 7, 1995, the district

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[1] A plea agreement under Rule 11(e)(1)(A) requires the government to "move for dismissal of other charges." An agreement under Rule 11(e)(1)(B) requires the government to "make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court." An agreement under Rule 11(e)(1)(C) requires the government to "agree that a specific sentence is the appropriate disposition of the case."

[2] The district court also ordered that the imprisonment be followed by three years of supervised release, and that respondent pay a $5,000 fine and restitution in the amount of

court entered judgment. J.A. 4, 75-80. Respondent timely appealed. C.A.9 ER at 140.[3]

On April 30, 1996, the Ninth Circuit reversed respondent's conviction, concluding that the district court erred by denying respondent's motion to withdraw his guilty plea.[4] The court ruled that if the district court defers acceptance of the plea or of the plea agreement, the defendant is at liberty to withdraw his plea, "until the time that the court does accept both the plea and the agreement." Pet. App. 4a; 92 F.3d at 781. In so ruling, the court rejected the United States' argument that Rule 32(e) requires a defendant to show a "fair and just reason" for withdrawal from a guilty plea, even before acceptance of the plea agreement. The court explained that the district court's acceptance of the guilty plea did not trigger the requirements of Rule 32(e) because:

> "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea."

Pet. App. 3a; 92 F.3d at 780 (quoting *United States v. Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 113 (Oct. 7, 1996) (No. 95-9101)). Noting the government's concern that the United States Sentencing Commission policy statement in U.S.S.G. § 6B1.1(c) requires the district court to defer acceptance of certain types of plea agreements pending preparation of the presentence report, and citing Rule 11(e)(2), which makes such deferment discretionary, the court of appeals suggested, "if the Sentencing Commission's interference with district court discretion causes practical difficulties regarding pleas, as well it may, that is a situation to which the Commission can turn its attention." Pet. App. 3a-4a; 92 F.3d at 781.

Judge Ferguson concurred, restating his dissent in *Cordova-Perez*:

> I continue to believe [*Cordova-Perez*] was decided incorrectly and that an injustice was done. Yet the government insisted upon the result. Now it would like us to disregard *Cordova-Perez*, which of course would be a monumental disaster. The government cannot have it both ways. When it advocated the result in *Cordova-Perez*, it must live with the mistake.

Pet. App. 5a; 92 F.3d at 781.

On July 29, 1996, the court of appeals unanimously denied the United States' petition for rehearing and rejected the suggestion for rehearing en banc. Pet. App. 6a-7a. On October 15, 1996, the court of appeals issued the mandate, having denied petitioner's third motion for a stay. On October 28, 1996, the petitioner filed the petition for certiorari. On November 19, 1996, the district court held a status conference and continued the case pending resolution of the proceedings in this Court. On

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$477,990.00. J.A. 76-80. Respondent had served the entire 30-month term of imprisonment and was already on supervised release when the court of appeals vacated his conviction.

[3] Respondent's Excerpts of Record filed in the court of appeals are referred to as C.A.9 ER.

[4] The court of appeals did not discuss respondent's other challenges to his conviction and sentence.

January 17, 1997, this Court granted the petition for certiorari.

STATEMENT OF LOWER COURT JURISDICTION UNDER RULE 14.1(i)

The district court had jurisdiction in this matter pursuant to 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, invoked by a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that when a criminal defendant tenders a guilty plea pursuant to a plea agreement, the defendant is free to withdraw that plea until the district court accepts *both* the plea and the plea agreement.

When a defendant tenders a guilty plea, the district court may accept or reject the plea agreement, or defer its decision to accept or reject the agreement until it reviews the defendant's presentence report. Fed. R. Crim. P. 11(e)(2).

A review of the Congressional intent behind 1974 amendments to Rule 11 ("Pleas") and Rule 32 ("Sentence and Judgment"), reveals that the district court cannot accept the defendant's tendered guilty plea until it also accepts the plea agreement upon which the agreement depends. In 1974, Rules 11 and 32 were amended to

accommodate judicial review of plea agreements. New Rule 11(e)(2) provided that the court may accept or reject a plea agreement, or defer acceptance of the plea agreement pending review of a presentence report. In order to make possible pre-guilt review of the presentence report, Rule 32(c)(1) (now Rule 32(b)(3)) was amended to allow, with the defendant's written consent, review of a presentence report before the defendant has pleaded guilty. Since Rule 32 already provided for review of the presentence report if the defendant had pleaded guilty, the amendment intended that deferment of acceptance of the agreement carried with it deferment of acceptance of the guilty plea. If a court could accept a guilty plea without accepting the dependent plea agreement, Rule 32(b)(3)'s consent requirement protection would be vitiated. Rule 32(b)(3) limits disclosure of presentence reports because such reports contain prejudicial information, relevant to sentencing but not guilt, which could prejudice the judge before whom the defendant might go to trial. Congress required consent for review of a presentence report before acceptance of the plea agreement because there is still the possibility that the judge will reject the agreement and the defendant will go to trial before the judge who has already reviewed the presentence report. If the judge could accept the guilty plea without accepting the plea agreement, the judge would be able to evade the consent requirement of Rule 32(b)(3). Given the clear Congressional intent to require consent before pre-guilt review of the presentence report, Congress intended that where the court defers acceptance of the plea agreement, acceptance of the plea itself must also be deferred.

As petitioner concedes for purposes of this case (Pet. Br. 16), Rule 32(e), which provides that a defendant can

withdraw a plea of guilty upon showing a "fair and just reason," does not apply prior to the court accepting the guilty plea. First, a defendant is not bound by a guilty plea until the court accepts the plea. Since, a court cannot legally accept the plea without accepting the plea agreement, the guilty plea was not accepted and the defendant was free to withdraw. Second, the "fair and just reason" standard was derived from dictum in the Court's 1927 decision in *Kercheval v. United States*, 274 U.S. 220 (1927). In *Kercheval*, the Court made it clear that a guilty plea is something that requires no more than sentencing and entry of judgment. The same is not true, however, where the court accepts a guilty plea, but defers acceptance of the plea agreement. Where acceptance of the agreement is deferred, the court must accept the agreement before it can sentence the defendant and enter judgment. The "fair and just reason" standard was not intended to apply where the court has deferred acceptance of the plea agreement.

The result sought by petitioner, binding a defendant to a guilty plea before the court approves the agreement upon which the plea depends, violates principles of fair administration of justice. Prior to the court's approval of the agreement, no party is able to reasonably rely upon, nor seek enforcement of, the terms of the agreement. It is manifestly unfair to bind a defendant to an agreement where the other parties – the court and the prosecutor – are not bound and where the defendant cannot seek enforcement. Also, allowing acceptance of the plea before the court accepts the agreement improperly allows the court to evade Rule 32(b)(3)'s consent requirement for pre-guilt review of presentence reports.

Petitioner argues that the court of appeals's holding applies to most cases and that it enables defendants to engage in manipulation by pleading guilty on the eve of trial and then withdrawing after preparation of the presentence report. Petitioner has overstated the scope of the ruling and its susceptibility to manipulation. While plea bargaining is undoubtedly the norm, petitioner has offered no proof that courts defer acceptance of plea agreements in most cases. Many types of agreements, such as promises to recommend a particular sentence (Rule 11(e)(1)(B)), or to not charge the defendant for conduct not covered by the pending indictment do not require acceptance by the court. The only types of agreements that require acceptance are charge-bargain (Rule 11(e)(1)(A)) and sentencing stipulation (Rule 11(e)(1)(C)) agreements. Fed. R. Crim. P. 11(e)(2). Petitioner's fear of manipulation is unfounded because there are tremendous incentives to plead guilty and because defendants, like the prosecution, often want quick resolution of the case. Defendants who withdraw guilty pleas to delay their trials will lose sentence reductions for acceptance of responsibility and could face an enhancement for obstruction of justice. If the prosecutor is concerned that a particular defendant might manipulate the system, the prosecutor can take the precaution of only entering into a Rule 11(e)(1)(B) sentence recommendation agreement with the defendant or by seeking court approval of the agreement at the change of plea hearing or shortly thereafter.

The result reached by the court of appeals was required by the rules, ensures fairness, and does not result in the sort of manipulation petitioner predicts.

ARGUMENT

PRIOR TO ACCEPTANCE OF A RULE 11(e)(1)(A) PLEA AGREEMENT, A CRIMINAL DEFENDANT IS FREE TO WITHDRAW HIS TENDERED GUILTY PLEA.

The court of appeals correctly ruled that deferment of acceptance of the plea agreement necessarily carries with it deferment of acceptance of the guilty plea, and until the district court accepts the plea agreement, the defendant may freely withdraw his guilty plea. 92 F.3d at 780. The government seeks reversal, arguing that the court of appeals' holding (1) is in conflict with the Federal Rules of Criminal Procedure and (2) has "serious adverse practical consequences." To the contrary, the holding (1) is *required* by the federal rules; (2) furthers the fair administration of justice; and (3) is neither as broad in scope nor as susceptible to manipulation as petitioner suggests.

1. Under The Federal Rules Of Criminal Procedure, A Guilty Plea Cannot Be Accepted And Is Not Binding Until Both The Plea *And* The Plea Agreement Are Approved By The Court.

Examination of the 1974 amendments to Rules 11 and 32 reveals that Congress intended that a guilty plea is neither accepted nor binding until the district court has also accepted the plea agreement. Moreover, the precedent upon which Rule 32(e)'s "fair and just reason" standard for withdrawal of a guilty plea is based shows that it was intended to apply to a guilty plea which was not contingent on the subsequent approval of the plea agreement. Finally, support for the interdependence of a guilty plea and a plea agreement is found in related contexts.

a. The Federal Rules of Criminal Procedure Reveal a Congressional Intent That The District Court Cannot Accept a Guilty Plea Until It Accepts the Plea Agreement Upon Which the Plea Depends.

Federal Rules of Criminal Procedure 11 and 32, entitled "Pleas" and "Sentence and Judgment" respectively, govern plea and plea agreement procedures. Prior to 1974, Rule 11 provided that a defendant could plead guilty and that the district court could refuse to accept such a plea. Former Rule 11, as amended Feb. 28, 1966, eff. July 1, 1966.[5] The rule said nothing about the district court's acceptance or rejection of a plea agreement. *Id.* In 1974, this Court transmitted to Congress extensive proposed amendments to the Federal Rules of Criminal Procedure, including new Rule 11(e)(2), which provided that when the defendant offers a guilty plea pursuant to a plea agreement, the district court "may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report."[6] Rule 11(e)(2); Rule 11, Notes of Advisory Committee on Rules, 1974 Amendment; 62 F.R.D. 271, 276 (April 22, 1974). After extensive hearings and comment, Congress enacted a bill adopting, with some changes, the proposed amendments. Congress modified, in part, proposed Rule 11(e)(2), but retained the language noted above, including the option of deferment

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[5] The pertinent parts of the former versions of Rules 11 and 32 discussed in this section are appended to this brief at App. 1-10.

[6] In 1979, Rule 11(e)(2) was clarified in respects not pertinent to this discussion. Rule 11(e)(2), as amended Apr. 30, 1979; Notes of Advisory Committee on Rules, 1979 Amendment.

of acceptance of a plea agreement pending review of the presentence report. Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; H.R. Rep. No. 247, 94th Cong., 1st Sess., at 2-7 (1975).

Prior to 1974, the rules allowed judicial review of a presentence report only if the defendant "has pleaded guilty or has been found guilty." Former Rule 32(c)(1) (now Rule 32(b)(3)); *Gregg v. United States*, 394 U.S. 489 (1969). In order to make possible the pre-guilt use of the presentence report required for deferred acceptance or rejection of the plea agreement, as contemplated by the adoption of Rule 11(e)(2), an amendment to Rule 32 was also required. The Advisory Committee Notes, which are "of weight" in construing the rule (*Torres v. Oakland Scavanger Co.*, 487 U.S. 312, 316 (1988) (citation omitted)), expressly stated that deferment of acceptance of the plea agreement "is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted." Fed. R. Crim. P. 11, Notes of Advisory Committee on Rules, 1974 Amendment, 62 F.R.D. 271, 285 (1974). Accordingly, an amendment to former Rule 32(c)(1) was proposed, allowing pre-guilt review of the presentence report "with the written consent of the defendant."[7] Former Rule 32(c)(1); Rule 32, Notes of

[7] Rule 32(c)(1) has since been renumbered and amended to permit the defendant and the prosecutor, in addition to the court, to see the presentence report prior to the guilty plea. The rule now reads: "The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty." Fed. R. Crim. P. 32(b)(3); Notes of Advisory Committee on Rules, 1989 Amendments and 1994 Amendments.

Advisory Committee on Rules, 1974 Amendment, 62 F.R.D. at 322. The Advisory Committee explained that the intent of the amendment to Rule 32 was "to permit the judge, after obtaining the defendant's consent, to see the presentence report in order to decide whether to accept a plea agreement." 62 F.R.D. at 322. As it did with Rule 11(e)(2), Congress modified the proposed amendment to former Rule 32(c)(1), but retained the language at issue in this case, providing for pre-guilt review of the presentence report with the defendant's consent. Pub.L. 94-64, § 3(31)-(34), 89 Stat. 371, 376; H.R. Rep. No. 247, 94th Cong., 1st Sess., at 17-18 (1975).

If Congress thought a court could accept a guilty plea without accepting the plea agreement, there would have been no reason to amend Rule 32 to make possible review of the presentence report prior to acceptance of the agreement. The pre-1974 version of Rule 32(c)(1) already allowed review of a presentence report when the defendant had "pleaded guilty." The 1974 amendments thus reveal that the district court cannot accept the guilty plea before it accepts the plea agreement.

The Advisory Committee Notes explain why Congress opted for earlier review of the presentence report instead of acceptance of the plea before acceptance of the plea agreement:

> It has been suggested that the problem [the need to see presentence reports before approving of pleas] be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. . . .

> *Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea.* . . . It enables the judge to have all the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

Fed. R. Crim. P. 32, Notes of Advisory Committee, 1974 Amendments (emphasis added) (citation omitted).

Relying upon Rule 32(c)(1) and the Advisory Committee notes to the 1974 amendments to Rule 11, the First Circuit has recognized that deferment of acceptance of the plea agreement in order to review the presentence report is possible only if the defendant has consented to the judge's review of the presentence report. *United States v. Cruz*, 709 F.2d 111, 114-15 (1st Cir. 1983); *see also United States v. Kurkculer*, 918 F.2d 295, 301 (1st Cir. 1990); *and United States v. Sonderup*, 639 F.2d 294, 295-296 (5th Cir. 1981) (no violation of former Rule 32(c)(1) where district court rejected plea agreement after reading presentence report with defendant's written consent). In *Cruz*, the court explained that allowing a court to revoke its earlier acceptance of a plea agreement on the basis of information in the presentence report "would completely vitiate the protective consent requirements embodied in Rules 11(e) and [former] 32(c)(1)." *Cruz*, 709 F.2d at 115. Allowing acceptance of the guilty plea before acceptance of the plea agreement would have the same effect – providing an end run around Rule 32(b)(3) and vitiating the consent

protection. In contrast, without discussing the advisory committee notes, the Ninth Circuit and the Seventh Circuit have both held that a conditionally accepted guilty plea "satisfies the requirement of Rule 32(b)(3) which provides that the court can review the presentence report after the defendant has pleaded guilty." *Cordova-Perez*, 65 F.3d at 1555-56; *see also United States v. Bunch*, 730 F.2d 517, 519 (7th Cir. 1984). As these cases do not consider the direct evidence of the intent of Rules 11 and 32, they are not persuasive on this point.

Prohibiting acceptance of the guilty plea prior to acceptance of the plea agreement helps fulfill the purposes of the disclosure provisions of Rule 32(b)(3) (former Rule 32(c)(1)). The disclosure provisions protect defendants from prejudice that might result if the judge, who might later preside over the trial, reviews, before a finding of guilt, the presentence report, which has "no formal limitations on [its] contents, and . . . may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged." *Gregg*, 394 U.S. at 492. Given this potential for prejudice, review of the presentence report is allowed only upon a guilty plea, a finding of guilt, or the defendant's written consent. Rule 32(b)(3). The concerns regarding prejudice are so great that the Advisory Committee Notes advise "where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case." Fed. R. Crim. P. 32, Notes of Advisory Committee, 1974 Amendments, 62 F.R.D. at 324. When a court defers acceptance of the plea agreement, there is still the potential that the judge will reject the agreement

and the defendant will proceed to trial before the same judge who reviewed the presentence report. With that possibility still looming, it makes sense to require the defendant's consent before a court uses a presentence report to decide whether to accept a plea agreement. Were acceptance of the guilty plea allowed before acceptance of the plea agreement, the letter and spirit of Rule 32(b)(3)'s consent requirement would be violated.

Petitioner posits that "there is nothing in the Federal Rules of Criminal Procedure that prohibits a district court from accepting a guilty plea before the district court has decided whether to accept a plea agreement." Pet. Br. at 18. While Rules 11(c), (d), and (f), which petitioner cites, state specific inquiries the court must make before accepting a plea, they do not state that the court can accept a guilty plea without accepting the plea agreement. Petitioner's analysis fails to account for the clear intendment found in the 1974 amendments: There can be no acceptance of the guilty plea until there is acceptance of the plea agreement.

Even if the rules allow "acceptance" of the guilty plea prior to acceptance of the agreement, which they do not, it does not mean that such "acceptance" makes the plea binding, or that it requires application of Rule 32(e)'s "fair and just reason" standard. See discussion *infra* at 17-21. At most, "acceptance" of the plea, without acceptance of the agreement, reflects the judge's determination that the plea is entered knowingly and voluntarily, that there is a factual basis for the plea, and that *if* the agreement is also accepted, the plea will become binding. Accordingly, the district court in this case necessarily

deferred its approval of both the plea and the plea agreement, which are inseparable. The actual nature of the underlying acts, not the district court's label, determines what the court did. *See Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.5 (1986).

Because the Congressional intent underlying Rule 11(e)(2) and Rule 32(b)(3) (former Rule 32(c)(1)) is that the court cannot accept a guilty plea without accepting the plea agreement, and because respondent's offer to plead guilty was conditioned on approval of the plea agreement, the deferment of acceptance of the plea agreement carried with it deferment of acceptance of the guilty plea. As the district court in this case did not have authority to accept the guilty plea without accepting the plea agreement, the attempt to do so was not effective and at the time respondent moved to withdraw there was no accepted plea and agreement binding him. Because the deferment of acceptance of respondent's plea agreement carried with it deferment of acceptance of his guilty plea, respondent was free to withdraw his tendered guilty plea at will. The court of appeals' decision should be affirmed.

b. Rule 32(e)'s "Fair and Just Reason" Standard Does Not Apply Where The Court Has Deferred Acceptance of the Plea Agreement.

Rule 32(e) of the Federal Rules of Criminal Procedure provides that prior to imposition of sentence, a defendant may withdraw from a "plea of guilty" upon a showing of "any fair and just reason." Fed. R. Crim. P. 32(e). For two related, but independent reasons, a defendant need not

show a "fair and just reason" under Rule 32(e) to withdraw a tendered, but not accepted, guilty plea.

First, as explained in the previous section, the court cannot accept a guilty plea before it accepts the plea agreement. As conceded for purposes of this case by petitioner, "[u]ntil the district court accepts a guilty plea, the defendant is free to withdraw it." Pet. Br. at 16 (citing *United States v. Washman*, 66 F.3d 210, 212-213 (9th Cir. 1995)); *see also United States v. Wessels*, 12 F.3d 746, 753 (8th Cir. 1993); *United States v. Papaleo*, 853 F.2d 16, 19 (1st Cir. 1988); *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980). Likewise, until a defendant pleads guilty, the prosecutor may withdraw from a plea agreement. *Mabry v. Johnson*, 467 U.S. 504, 507-11 (1984); *Wessels*, 12 F.3d at 753. Because the district court had not effectively accepted the plea at the time respondent moved to withdraw his plea and because a plea is not binding until the court accepts it, respondent did not need to show a "fair and just reason" for withdrawing his offered plea. The cases petitioner cites (Pet. Br. 15) to support application of Rule 32(e) after acceptance of the plea but before acceptance of the plea agreement fail to consider the legislative history, discussed in section 1(a), *supra*, showing the intent that the district court cannot accept a guilty plea until it accepts a plea agreement. *United States v. Ewing*, 957 F.2d 115, 119 (4th Cir.), *cert. denied*, 505 U.S. 1210 (1992); *United States v. Ellison*, 798 F.2d 1102 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987).

Second, the evolution of Rule 32(e) shows that it applies to fully accepted guilty pleas, not merely tendered pleas and not merely conditionally accepted pleas. In 1983, former Rule 32(d) (now Rule 32(e)) was amended

to "incorporate[ ] the 'fair and just' standard which the federal courts, relying upon dictum in *Kercheval v. United States*, 274 U.S. 220 (1927), have applied to presentence motions [to withdraw]."[8] Fed. R. Crim. P. 32, Notes of Advisory Committee on Rules, 1983 Amendment. In 1927, when the Court stated in *Kercheval* its approval of the "fair and just reason" standard, it did not have in mind merely a tendered plea nor a "conditionally" accepted plea. In fact, the *Kercheval* Court described how it viewed a guilty plea: "Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval*, 274 U.S. at 223. More recent decisions of the court confirm that a "plea of guilty" is more than a mere admission of conduct. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("a plea of guilty is more than an admission of conduct; it is a conviction") (footnote omitted); *Brady v. United States*, 397 U.S. 742, 748 (1970) ("the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge").

In fact, when the Court decided *Kercheval* in 1927 and when former Rule 32(d) was first adopted in 1944, there was no provision for judicial review of plea agreements, let alone deferment of acceptance of the plea agreement pending review of the presentence report. Prior to the 1974 amendments, "plea discussions and agreements . . . occurred in an informal and largely invisible manner."

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[8] In *Kercheval*, the Court held that a withdrawn guilty plea is inadmissible in a subsequent trial on the same charges. 274 U.S. 220.

Fed. R. Crim. P. 11, Notes of Advisory Committee, 1974 Amendment, 62 F.R.D. at 282. The objective of the 1974 amendment was "to bring the existence of the plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement." *Id.* at 277. Implicitly, there was little review of plea agreements prior to 1974.

Deferment of acceptance of the plea agreement did not become essential and mandatory until the 1987 adoption of the Sentencing Reform Act, which brought determinate sentencing and the federal Sentencing Guidelines. Contrary to the permissive language of Rule 11(e)(2), the guidelines expressly provided that in the case of Rule 11(e)(1)(A) (charge-bargain) and Rule 11(e)(1)(C) (sentence stipulation) plea agreements, the judge "shall" defer acceptance of the plea agreement in order to review the presentence report. U.S.S.G. § 6B1.1(c), p.s. Prior to the guidelines, there was little need for the judge to defer acceptance of the plea agreement: "a judge often could accept [a charge-bargain] agreement without notably limiting his or her sentencing power. With the guidelines, the dismissal of charges has a more direct and substantial effect on sentencing." Albert W. Alshuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, Federal Sentencing Reporter, September 1989 at 94. With the advent of the guidelines, deferment became essential, requiring the judge to determine whether the sentence resulting from the bargain adequately reflected the seriousness of the conduct.

Since a guilty plea is a conviction, not needing anything more than entry of judgment, and since deferral of acceptance of the agreement became necessary relatively

recently in the long life of the "fair and just" standard, the standard cannot be said to have been intended to apply to a tendered guilty plea which was conditioned on later acceptance of the plea agreement. Unlike the plea in *Kercheval*, when there is deferment of acceptance of the plea agreement, "more" is required before sentencing and judgment. The court must first accept the plea agreement. Until the court does so, the court cannot sentence the defendant or enter a judgment of conviction on the record, and the defendant is not bound by the plea. *Kercheval* presupposes a guilty plea which is not conditioned on later acceptance of a plea agreement. Accordingly, Rule 32(e)'s "fair and just reason" standard does not apply to a motion to withdraw a guilty plea filed prior to acceptance of the plea agreement.

Rule 11(e)(4) also suggests that Rule 32(e) does not apply to a guilty plea where the plea agreement has not been accepted. Rule 11(e)(4) provides, in pertinent part, "[i]f the court rejects the plea agreement, the court shall . . . afford the defendant the opportunity to then withdraw the plea." Under this provision, if the court rejects the plea agreement, Rule 32(e)'s "fair and just reason" standard does not apply. It is implicit in Rule 11(e)(4) that Rule 32(e) does not apply because the defendant is *absolutely* not bound by a guilty plea if the plea agreement has not been accepted. Rule 11(e)(4) recognizes that the guilty plea and the plea agreement are "inextricably bound up together." The principle applies where the district court has rejected the plea agreement or, as in this case, where the district court has not yet accepted or rejected the agreement.

Petitioner claims that Rule 11(e)(4) "states the only circumstance in which the defendant may unilaterally withdraw a plea." Pet. Br. 14. But Rule 11(e)(4) is not a rule setting out all the circumstances under which a defendant can withdraw a tendered guilty plea. Rule 11(e)(4), which is entitled "Rejection of a Plea Agreement," simply sets out what the district court must do upon rejecting a plea agreement: inform the parties of the rejection of the agreement; advise the defendant that the court is not bound by the agreement; afford the defendant the opportunity to withdraw; and advise the defendant that if he or she persists in the guilty plea, the disposition may be less favorable than contemplated by the agreement. It would not make sense to place under the heading "Rejection of a Plea Agreement" a provision for withdrawing from a guilty plea when the district court has not yet rejected the agreement. Since Rule 11(e)(4) does not set out all of the circumstances under which a defendant can withdraw from a plea agreement, the court of appeals decision allowing withdrawal before rejection of the agreement is not in conflict with that rule. To the contrary, Rule 11(e)(4), in its recognition of the inseparability of pleas and plea agreements, supports the court of appeals' decision.

Accordingly, Rule 32(e)'s "fair and just reason" standard does not apply unless the court has accepted the guilty plea, which cannot be accepted before the court accepts the plea agreement.

c. Guilty Pleas Tendered Pursuant to a Plea Agreement Are Inherently Conditional, Not Having Effect Until The District Court Accepts The Agreement.

In related contexts, courts have noted the guilty plea's dependence on acceptance of the plea agreement. For instance, the courts have held that acceptance of the guilty plea does not bind the district court to the agreement. *Cordova-Perez*, 65 F.3d at 1554-56; *United States v. Livingston*, 941 F.2d 431, 436 (6th Cir. 1991).

Both the Fifth and the Ninth Circuits have noted the fact that guilty pleas are inherently conditional when they are accompanied by an unaccepted plea agreement. For example, in *Cordova-Perez*, the Ninth Circuit held that even after accepting a guilty plea the district court can reject the plea agreement, vacate the previously accepted guilty plea, and order that the defendant be tried. *Cordova-Perez*, 65 F.3d at 1556. In *Cordova-Perez*, the district court, as in this case, expressly accepted the guilty plea but deferred acceptance of the plea agreement. *Cordova-Perez*, 65 F.3d at 1554. After reviewing the presentence report, however, the district court rejected the plea agreement. Over the defendant's objection, the court vacated the defendant's guilty plea to a lesser offense, and reinstated the original indictment. *Id.* On appeal, the defendant argued that the rejection of the previously accepted guilty plea violated the Federal Rules of Criminal Procedure and the Double Jeopardy Clause. *Id.* at 1554-57. As urged by the government, the Ninth Circuit rejected these arguments on the ground that "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the

plea." *Cordova-Perez*, 65 F.3d at 1556.[9] The *Cordova-Perez* court went on to hold that the possibility that the court might vacate the guilty plea is inherent when acceptance of the guilty plea is conditional. The court also held that jeopardy does not attach when acceptance of the guilty plea is conditional.[10] *Cordova-Perez*, 65 F.3d at 1556-57.

Similarly, the Fifth Circuit has held that relief is not available to a criminal defendant where the government breached the terms of an agreement prior to its approval

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[9] When the defendant in *Cordova-Perez* sought review by this Court, petitioner opposed a grant of certiorari, and agreed with the court of appeals' holding that "acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement." Brief for the United States in Opposition, at 6 n.4, *Cordova-Perez* (No. 95-9101). When that rule was applied against the government in this case, it then argued that the rule was incorrect. Reply Br. On Pet. for Cert. at 8. Petitioner's change of position came quickly, having filed its petition for certiorari in this case just three weeks after the Court denied the petition for certiorari in *Cordova-Perez*. *Compare* Pet. (filed October 28, 1996) *with Cordova-Perez, cert. denied*, 117 S. Ct. 113 (Oct. 7, 1996) (No. 95-9101).

[10] Under petitioner's rule, jeopardy may attach when the trial court accepts a plea to a lesser included offense but defers acceptance of the plea agreement. Although this Court has held that jeopardy does not attach when a defendant pleads to a lesser included offense if the prosecutor objects "to disposing of any of the counts against [the defendant] without a trial," *Ohio v. Johnson*, 467 U.S. 493, 501 (1984), it is still an open question whether jeopardy would attach to a plea that the prosecutor negotiated. Of course, under the correct rule announced by the court of appeals in this case, these jeopardy problems are avoided because when the plea is not accepted until the plea agreement is also accepted there is no conviction and no jeopardy.

by the court. *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980). The *Ocanas* court aptly explained that until the court accepts the plea agreement, the parties cannot rely on the bargain and are free to withdraw:

> [T]he realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely on the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, *we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.*

Id. at 358 (emphasis added).

The interdependence of pleas and plea agreements is also implicit in the courts' interchangeable use of the terms "plea" and "plea agreement" when discussing acceptance and deferment. *See e.g. United States v. Blackwell*, 694 F.2d 1325, 1339 (D.C. Cir. 1982) ("the rule does permit deferral of the decision to accept or reject the *plea*, usually for the purpose of viewing the presentence report") (emphasis added); and *United States v. Kurkculer*, 918 F.2d 295, 301 (1st Cir. 1990) ("Fed.R.Crim.P. 11(e) allows the court to accept or reject a *guilty plea*, or to defer its decision until it has had the opportunity to review the presentence report.") (emphasis added).

2. An Absolute Right to Withdraw Prior to Acceptance of the Plea Agreement Is Essential to the Fair Administration of Justice.

Several policy concerns support the court of appeals' holding that a guilty plea cannot be accepted and is not binding until the court also accepts the plea agreement. First, if a guilty plea can be accepted prior to acceptance of the plea agreement, the courts will be able to evade Rule 32(b)(3)'s consent requirement for pre-guilt review of the presentence report. Prior to acceptance of the agreement, trial is still a possibility as the court may reject the agreement. Given the serious potential for prejudice resulting from review of the presentence report, the consent requirement must be preserved. The consent provision can be preserved only by prohibiting district courts from "conditionally" accepting a plea to evade Rule 32(b)(3)'s consent requirement.

Second, it is manifestly unfair to bind a defendant to an agreement before the prosecutor and the court are likewise bound and before the defendant can rely on the agreement. The caselaw is clear that before the court accepts the agreement the defendant cannot reasonably rely upon it. *See e.g. Livingston*, 941 F.2d at 436 (6th Cir. 1991); *Wessels*, 12 F.3d at 753 (defendant "was not justified in relying on the terms of the plea agreement because it had not been approved and accepted by the district court") (footnote omitted). Petitioner seeks the anomalous result that a defendant be bound by an agreement during a period of time when he or she cannot rely upon the agreement. As the *Blackwell* court explained, "Pleas that bind only the defendant, or even the prosecutor and the defendant, but not the judge, would be unfair to the

defendant and would dilute the incentive for defendants to plea at all." *Blackwell*, 694 F.2d at 1339.

Implicit in a defendant's tendered guilty plea and concomitant waiver of his constitutional right to a trial, is that the plea and the waiver are offered on the condition that the court will accept both the plea and the plea agreement. Where the plea is made pursuant to a plea agreement, the defendant offers for acceptance a package consisting of both his plea and the agreement – the defendant does not offer one without the other. The court should not be free to accept the guilty plea and the waiver of the right to trial, until it accepts the dependent plea agreement.

Finally, in light of the complexity and determinate nature of the Sentencing Guidelines, allowing defendants to review the presentence report before they are bound by the agreement serves the important function of having defendants understand the implications of the agreements they enter. While still a circuit judge, Justice Breyer recognized that the sentencing consequences of a plea are not known until the court accepts the plea agreement: "the [Sentencing] Commission has suggested that a court can, in its discretion, defer consideration of the plea agreement until it has read the probation officer's report. . . . Such a deferral may be necessary in order for the court to inform the defendant of the sentencing consequences of the plea, as required by Rule 11(c)(1)."[11]

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[11] Rule 11(c)(1) requires the court to advise the defendant of, among other things, the mandatory minimum sentence and the maximum sentence under the agreement.

Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 30 n.144 (1988) (citations omitted). Implicit in this statement is the recognition that it is approval of the plea agreement, particularly in the case of type A charge-dismissal agreements, which determines the real minimum and maximum sentence a defendant faces. As one court has noted, "while Rule 11 requires a court to advise the defendant of the 'maximum possible penalty provided by law' . . . in many federal criminal cases today, this statutory maximum is irrelevant. The reality is that the sentencing court is confined to the range of penalties prescribed by the Guidelines except in the rare instances in which an upward departure is permitted." *United States v. Horne*, 987 F.2d 833, 838 (D.C. Cir. 1993) (Buckley, J. writing separately for the court.) Such a discrepancy was present in this case. At the Rule 11 hearing the court advised respondent that his statutory maximum sentence under the plea agreement was 30 *years*; from the presentence report, respondent learned that absent a departure the maximum legal sentence under the guidelines, as applied pursuant to 18 U.S.C. § 3553(b), was 30 *months*. Compare J.A. 52 with J.A. 80. While Rule 11 and the constitution may not require advice as to the ultimate sentencing range under the guidelines, allowing a defendant to review his presentence report prior to being bound by a guilty plea would make defendants' decisions to plead guilty more informed. Whether the court of appeals' holding results in pre-plea preparation of the presentence report or allows withdrawal after review of the presentence report, the worthwhile end of more informed decisions is served.

3. The Court of Appeals' Holding Neither Applies to All Plea Agreements Nor Introduces Instability Into the Plea Bargaining Process.

Petitioner has sounded the alarm, complaining that the holding of the court of appeals will "introduce substantial instability into the plea bargaining process" and "encourages defendants to engage in manipulation and gamesmanship." Pet. Br. at 9, 21. As an example, petitioner suggests that a defendant could delay a trial several months by entering a plea just before trial and by withdrawing the plea just before sentencing. *Id.* at 21. There is, however, no cause for panic. Petitioner has overstated both the scope of the holding below and the potential for abuse.

a. The Court of Appeals' Ruling Does Not Apply to "Most" Plea Agreements.

Petitioner vastly overstates of the court of appeals' holding claiming, "the net effect of the Ninth Circuit's rule would be to displace Rule 32(e)'s 'fair and just reason' standard in *most* cases from the time of entry of the guilty plea until the presentence report is prepared, at or near sentencing." Pet. Br. at 22-23 (emphasis added). The rule does not apply to "most cases" and does not require deferment of acceptance of the agreement until sentencing.

Petitioner correctly states that the rule would "apply to any case in which (a) the court has accepted a guilty plea at the Rule 11 plea proceeding, and (b) the court has deferred accepting an accompanying plea agreement." Pet. Br. 21. But, as petitioner acknowledges elsewhere

(Pet. Br. 13 n.3), deferment of acceptance of the plea agreement is only possible in 11(e)(1)(A) (charge dismissal) and 11(e)(1)(C) (sentence stipulation) agreements, *not* in 11(e)(1)(B) (sentence recommendation) agreements. Fed. R. Crim. P. 11(e)(2). At least one court has held that the Ninth Circuit's decision in this case applies only to Rule 11(e)(1)(A) and 11(e)(1)(C) agreements, and not to Rule 11(e)(1)(B) agreements. *United States v. Lopez-Reyes*, 933 F.Supp. 957, 959-60 (S.D. Cal. 1996). The government, while acknowledging that 11(e)(1)(B) agreements do not require acceptance (and therefore deferment), cites no statistics on the frequency of the different types of agreements. Pet. Br. 12-13, 22, 13 n.3. Without such statistics, the petitioner's bald assertion that "courts ordinarily defer decision on whether to accept the plea agreement," is mere speculation. Pet. Br. at 22.

Type C (sentence stipulation) agreements are in any event "very rare." *See* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines*, 27 Am. Crim. L. Rev. 231, 239 (1989). Although charge-bargain agreements appear to be the most common, there is no evidence that they constitute "most" of all bargains. *Id.* The majority of bargains could consist of type B (sentence recommendation) agreements combined with agreements which do not fall under any of the three specified types, such as cooperation agreements, fact-stipulation agreements, agreements not to charge a third party, agreements to not seek forfeiture of property, or agreements not to charge unrelated, uncharged conduct.

Petitioner has thus offered no evidence that deferment of acceptance of the plea agreement is either possible or likely in "most" cases. Even if the guidelines

directive to defer acceptance of the plea agreement (U.S.S.G. § 6B1.1, p.s.) has resulted in more frequent deferment of acceptance of plea agreements and thus diminished the applicability of Rule 32(e), this does not change the intent of Rules 11 and 32 (see discussion in section 1, *supra*). The proper remedy is not judicial reinterpretation of the rules to fit changed practices, but amendment of any stale rules or guidelines through the rules and guidelines amendment procedures. In fact, with respect to plea bargain practice, the Sentencing Commission has expressly stated that it intends to monitor plea bargain practices and further regulate plea agreement process as needed. U.S.S.G. Ch. 1 Pt. A(4)(c).

Moreover, as discussed in detail below, in the cases where deferment is possible the district court is not required to defer. The district court can accept the agreement at the Rule 11 hearing without waiting for the presentence report, or the district court can have the presentence report prepared early, prior to the plea. See note 14, *infra*. In either case, Rule 32(e)'s "fair and just reason" standard would apply long before the sentencing hearing, and would not evaporate in most cases.

b. There Are Effective Mechanisms To Curtail Any "Manipulation" Resulting From The Rule.

Petitioner need not fret about manipulation or gamesmanship as it has effective tools to eliminate any incentives to withdraw from the types of agreements (A and C) where deferment is allowed.

First, there is inherently little to no incentive for a defendant to withdraw from a type C agreement. Such an

agreement includes a stipulation to a specific sentence, and leaves no uncertainty as to the defendant's sentence. The content of the presentence report, while influencing the court's decision as to whether to accept the agreement, can have no influence on the actual sentence should the court accept the agreement. Type C defendants have no reason to manipulate the government by withdrawing after reviewing their presentence reports.

Second, petitioner also need not worry about defendants withdrawing from type A agreements. If the government is entering into meaningful type A bargains, defendants will have little incentive to withdraw from the plea agreements. Because uncharged conduct and dismissed charges can be relied upon in sentencing, as they were in this case (U.S.S.G. § 1B1.3)[12], many type A agreements to dismiss charges are relatively empty promises which offer very little to defendants. This is so unless the defendant pleads guilty to a lesser offense with no minimum sentence in lieu of a greater offense which has a mandatory minimum sentence, or where the lesser offense has a very low maximum sentence. Thus, if the government is concerned that a particular defendant is unreliable and will withdraw from type A agreements after viewing the presentence report, the government can refrain from entering the type A agreements which do not significantly limit the defendant's sentence. As such

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[12] Cf. *Watts v. United States*, ___ U.S. ___, 117 S. Ct. 633 (1997) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.")

agreements offer little to defendants, such a policy should not impede the government's ability to reach agreements with defendants. Although there may be other incentives to plea bargaining, such as avoiding any additional stigma of multiple counts of conviction, a primary motivation for pleading guilty is the chance for a reduced sentence. See Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 Am. Econ. Rev. 749, 750 (1983).

Where type A agreements are not illusory, they guarantee such significant sentence protection that few defendants would seek to withdraw from those agreements. Those cases involve a guilty plea to a lesser offense which has a substantially lower maximum sentence compared to the dismissed charge, which might have a minimum mandatory sentence.[13] Such a bargain has tremendous benefit for the defendant, possibly limiting the *maximum* sentence on the count of conviction to be lower than the *minimum* sentence for the dismissed charge.

Third, there are in all cases, type A or type C, substantial disincentives to the manipulations petitioner predicts. Perhaps most profound and pervasive, by

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[13] A bargain of this type has been found in drug cases where the defendant has been charged with a drug offense involving a minimum mandatory sentence of five or ten years. 21 U.S.C. § 841(b). In exchange for the dismissal of the drug charge, the defendant pleads guilty to a charge, for example, of use of a communication facility in connection with a drug offense. 21 U.S.C. § 843. The telephone charge has a *maximum* penalty of four years and no mandatory minimum. *Id.*

withdrawing a guilty plea a defendant may lose a sentence reduction for acceptance of responsibility. A defendant who timely accepts responsibility can receive a two- or three-level reduction in his or her total offense level. U.S.S.G. § 3E1.1. In fact, the relative stability of plea bargaining rates before and after the implementation of the Guidelines has been tied to "the remaining tangible reasons for a defendant to plea bargain, among them the acceptance of responsibility reduction and the potential for a prosecutor's recommendation of the low end of the sentence range." Tung Yin, Comment, *Not A Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 Cal. L. Rev. 419, 460 (1995). Moreover, if the guilty plea were used as a ruse to delay the proceedings in the hope that witnesses and evidence would be lost, the defendant might suffer a two-level enhancement, or even a separate conviction for a willful endeavor to obstruct "the due administration of justice." U.S.S.G. § 3C1.1; 18 U.S.C. § 1503(a). In short, the incentives to plead guilty are great – so much so that the rate of federal criminal convictions obtained by guilty plea has steadfastly exceeded 90% for many years. *Santobello v. New York*, 404 U.S. 257, 264 n.2 (1971) (Douglas, J. concurring) (90.2% in 1964); Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-4, p. 221 (1996) (91.7% for 12-month period ending Sept. 30, 1996)). The driving forces behind these statistics do not disappear, nor are they diminished, if the Court affirms the court of appeals in this case.

Fourth, if the government is wary that a particular defendant is apt to manipulate the system, the government can ask the district court to accept the plea agreement at the Rule 11 hearing with or without a presentence report. The purpose of deferment of acceptance pending review of the presentence report is to enable the court to determine whether the remaining charges reflect the seriousness of the offense and that the agreement does not undermine the intent of the criminal code or the Sentencing Guidelines. U.S.S.G. § 6B1.2(a), p.s. In many cases, where the severity of the offense, *e.g.*, magnitude of financial loss caused or quantity of drugs, is apparent without a presentence investigation, the court can pass on the appropriateness of the bargain without waiting for the presentence report.[14] See William Stafford (then-Chief Judge, N.D. Fla.), *Settling Sentencing Facts at*

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[14] To some extent there is a conflict between Rule 11(e)(2), which makes deferment of acceptance of a type A and C plea agreements permissive, and U.S.S.G. § 6B1.1(c) which makes such deferment mandatory. According to the Sentencing Commission itself, Rule 11(e)(2) controls over the guidelines in the case of a conflict like this: "The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements. . . . The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance and rejection of such agreements." U.S.S.G. Ch. 1, Pt. A(4)(c). Also, the extent to which a Sentencing Commission policy statement which does *not* interpret a guideline may be binding is not definitively resolved. *Cf. Stinson v. United States*, 508 U.S. 36 (1993); *Williams v. United States*, 503 U.S. 193, 200-201 (1992). The Sentencing Reform Act authorized the Sentencing Commission to promulgate policy statements, but *not* guidelines, with respect to plea bargain practice. 28 U.S.C. §§ 994(a)(1) and (2)(E).

the Guilty Plea Hearing: A Time-Saver For the Court, Federal Sentencing Reporter, January/February, 1991 at 214 ("most of the factors we must take into account at sentencing can be established at [the] time of the Rule 11 plea procedure").

If earlier acceptance of the agreement raises concerns that acceptance might come before review of the presentence report, another solution would be earlier preparation of presentence reports. The rules permit preparation and review of the presentence report prior to acceptance of the guilty plea and plea agreement. Fed. R. Crim. P. 32(b)(1), (3), and (6); *United States v. Kurkculer*, 918 F.2d 295, 301 (1st Cir. 1990) (Rule 32 was modified to permit the district court, with the defendant's permission, to see the presentence report prior to accepting a guilty plea).

Pre-plea preparation of presentence reports would not only permit earlier acceptance of plea agreements, but would better ensure that the defendant enters the guilty plea with more complete information. *See United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995) (court "sympathetic" to defense counsel's concerns that presentence report should be prepared during plea negotiations and prior to acceptance of the guilty plea); *United States v. Horne*, 987 F.2d 833, 839 (D.C. Cir. 1993) (Buckley, J., writing separately for the court) ("Because the Guidelines have largely replaced the statutes as the determinants of the maximum penalty facing criminal defendants, we recommend that, wherever feasible, the district court make their presentence reports available to defendants before taking their pleas."); *see also* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 Columbia L. Rev. 1059, 1117-18 (1976) (presentence report of

limited content should be made available prior to plea bargaining). Such procedures would also ensure, up front, that guilty pleas more accurately reflect the seriousness of the offense.

Even without a pre-plea presentence report, prosecuting attorneys can avoid late withdrawals of guilty pleas by complying with a suggestion of the Sentencing Commission: "prior to the entry of a plea of guilty . . . to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." U.S.S.G. § 6B1.2, comment. Such early disclosure would eliminate most surprises in the presentence report and thus significantly reduce the impetus for a defendant to withdraw a guilty plea late in the proceeding.

Petitioner claims that withdrawal of the guilty plea after preparation of the presentence report will result in "needless preparation and review of a presentence report." Pet. Br. at 21. Somehow, petitioner forgets that when a defendant goes to trial, a presentence report will still be necessary in most cases. In the 12-month period ending September 30, 1996, approximately 82% of defendants who went to trial were convicted (84% if drunk driving and traffic offense trials are not counted). Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-4, pp. 221-223 (1996). Odds are very strong that the defendant who withdraws from a plea agreement and goes to trial will be convicted, and the earlier-prepared presentence report will be needed.

Finally, the government assumes that delay of the trial is to the defendant's advantage. To the contrary, defendants are also often harmed by delay. If the defendant has private counsel, having to pay twice for trial preparation may be quite costly. If the defendant is in pre-trial detention, trial delays will result either in delaying his or her release following acquittal or delaying his or her transfer from jail to prison. Finally, delays in the trial could impede the defense, resulting in the loss of defense witnesses or evidence.

While the court of appeals' rule may make delay and manipulation theoretically possible, it does not make it likely. There are other pre-trial procedures, such as discovery, change of counsel, or pre-trial motions, which can also be used for delay. While some defendants, and prosecutors for that matter, might manipulate such procedures for purposes of delay, the mere possibility that a few might do so is not so great that the procedures are eliminated.

Petitioner's predictions of calamity are unsupported by available statistics. If petitioner is correct that the court of appeals' holding will result in defendants withdrawing from guilty pleas upon review of the presentence report, then there should be a reduction in the rate of conviction by guilty plea. Although the court of appeals published its decision less than a year ago, on April 30, 1996, statistics are available on guilty plea rates for a portion of that period. If things were as dire as petitioner suggests, there should already be some measurable drop in the rate of conviction by guilty plea in the Ninth Circuit. But there has been no such change. In fact, the Ninth Circuit's rate of conviction by guilty plea was

slightly higher for the 12-month period ending September 30, 1996, (95.7%), when compared to the rates for the 12-month periods ending September 30, 1995, (95.6%) and September 30, 1994, (93.9%). Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, p. 233 (1996); Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, p. 237 (1995); Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, p. A-86 (1994).

Likewise, the rates of conviction by guilty plea in the Fourth Circuit (89.5%) and the Seventh Circuit (89.9%), which have expressly disapproved of the court of appeals' rule in this case, are lower than the Ninth Circuit rate (95.7%) for the period ending September 30, 1996. Administrative Office of the United States Courts, Judicial Business of the United States Courts, Table D-7, pp. 232-33 (1996).

Moreover, petitioner has shown no evidence that defendants are relying on this rule to delay their trials by pleading guilty on the first day set for trial, and then, months later, withdrawing the plea and going to trial. If petitioner's fears are justified, there should be evidence of such tactics. Petitioner offers none.

As there are built-in disincentives for the sort of manipulation petitioner forewarns, as the only available statistics show that there has been no reduction in the rate of conviction by guilty plea in the Ninth Circuit, and as the government has offered no evidence that there has

been such an effect, the world of plea bargaining will not collapse should the Court affirm the court of appeals. The Court has previously refused to be swayed by similar unfounded cries of calamity. *United States v. Mezzanatto*, 115 S.Ct. 797, 804-05 and n.6 (1995) (rejecting argument that allowing waiver of Rule 11(e)(6)'s prohibition on the admissibility of plea-statements would have a chilling effect on plea bargaining where "Respondent ha[d] failed to offer any empirical support for his apocalyptic predictions"). As in *Mezzanatto*, the only available statistical data indicates that the court of appeals' ruling has had no impact on the guilty plea rate in the Ninth Circuit.

CONCLUSION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit should be affirmed.[15]

Respectfully submitted,

JONATHAN D. SOGLIN
Attorney for Respondent

Dated: March 28, 1997

[15] Should the Court disagree and reverse the judgment of the court of appeals, respondent requests a remand to the court of appeals to enable that court to consider and decide the additional issues respondent raised in that court, which the court of appeal did not reach in light of its reversal of respondent's conviction on the ground before this Court.

APPENDIX

FEDERAL RULES OF CRIMINAL PROCEDURE

1. Rule 11 of the Federal Rules of Criminal Procedure, as amended Feb. 28, 1966, eff. July 1, 1966, provided:

Rule 11. Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

2. Rule 11 of the Federal Rules of Criminal Procedure, as amended Apr. 22, 1974, eff. Dec. 1, 1975, eff. Aug. 1 and Dec.1, 1975; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372, provided:

Rule 11. Pleas

(a) **Alternatives.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) ***Nolo Contendere.*** A defendant may plead nolo contendere only with the consent of the court. Such a plea

shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) **Insuring that the plea is voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) **Plea agreement procedure.**

(1) **In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding the such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing

of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or

offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of the plea.

3. Rule 11, Federal Rules of Criminal Procedure, Notes of Advisory Committee on Rules, 1974 Amendment provided, in part,:

* * *

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted.

* * *

4. Former Rule 32(c)(1) of the Federal Rules of Criminal Procedure, as originally enacted, provided:

Rule 32. Sentence and Judgment

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

5. Former Rule 32(c)(1) of the Federal Rules of Criminal Procedure 32(c)(1), as amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(31)-(34), 89 Stat. 376, provides:

Rule 32. Sentence and Judgment

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information

sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

6. Rule 32, Federal Rules of Criminal Procedure, Notes of Advisory Committee on Rules, 1974 Amendment provided, in part,:

* * *

Subdivision (c)(1) makes clear that a presentence report is required except when the court otherwise directs for reasons stated of record. The requirement of reasons on the record for not having a presentence report is intended to make clear that such a report ought to be routinely required except in cases where there is a reason for not doing so. The presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by further rule change. For an analysis of the current rules as it relates to the situation in which a presentence investigation is required, see C. Wright, Federal Practice and Procedure: Criminal § 522 (1969); 8A J. Moore, Federal Practice ¶ 32.03[1] (2d ed. Cipes 1969).

Subdivision (c)(1) is also changed to permit the judge, after obtaining defendant's consent, to see the presentence report in order to decide whether to accept a

plea agreement, and also to expedite the imposition of sentence in a case in which the defendant has indicated that he may plead guilty or nolo contendere.

Former subdivision (c)(1) provides that "The report shall not be submitted to the court * * * unless the defendant has pleaded guilty * * * ." This precludes a judge from seeing a presentence report prior to the acceptance of the plea of guilty. L. Orfield, Criminal Procedure Under the Federal Rules § 32:35 (1967); 8A J. Moore, Federal Practice ¶ 32.03[2], p. 32-22 (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 523, p. 392 (1969); *Gregg v. United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969).

Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.

It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. See American Bar Association, Standards Relating to Pleas of Guilty § 3.3 (Approved Draft, 1963); President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society 136 (1967).

Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. See

Enker, Perspectives on Plea Bargaining, Appendix A of President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 117 (1967). It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

There is presently authority to have a presentence report *prepared* prior to acceptance of the plea of guilty. In *Gregg v. United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969), the court said that the "language [of rule 32] clearly permits the preparation of a presentence report before guilty plea or conviction * * * ." In footnote 3 the court said:

The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed.Rules.Crim.Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed.Rules.Crim.Proc., Second Preliminary Draft 126-128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred

that the entire investigation be conducted after determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

Where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case. This is left to the discretion of the judge.

* * *

(9)

No. 96-667

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Our position in this case is that when a defendant properly tenders a guilty plea under Rule 11 of the Federal Rules of Criminal Procedure and the court duly accepts it, the defendant may withdraw that plea only if the defendant has a "fair and just reason" to do so under Rule 32(e) or if the court rejects the accompanying plea agreement under Rule 11(e)(4). That position is dictated by the explicit provisions of Rules 32 and 11 that provide for withdrawal of guilty pleas under those reasonable conditions.

Respondent does not and cannot claim that there is any provision in Rule 11 or 32—or anywhere else in federal law—that expressly prohibits a district court from accepting a guilty plea before it has decided

whether to accept an accompanying plea agreement. Instead, respondent argues that a plea should be subject to free withdrawal until the court decides whether to accept the plea agreement because, first, some of the notes accompanying the 1975 amendment to Rule 32 regarding disclosure of presentence reports suggest that the Advisory Committee believed that courts would defer acceptance of a plea until they had accepted an accompanying plea agreement, see Resp. Br. 12-16; second, providing the defendant an absolute right to withdraw a guilty plea even if the defendant has no fair and just reason to do so is "essential to the fair administration of justice," *id.* at 26; and, third, the court of appeals' rule of free withdrawal at any time until the eve of sentencing would not inject instability into the plea bargaining process, *id.* at 29-40. Each of those contentions is wrong.

1. a. Before 1975, Rule 32 provided that a presentence report "shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." 18 U.S.C. App. Rule 32(c)(1) (1970). In 1974, the Advisory Committee proposed a number of amendments to the Federal Rules that for the first time addressed plea bargaining and plea agreements. Those amendments included an amendment to Rule 32, which modified the Rule to provide that a presentence report may be disclosed only if "the defendant has pleaded guilty or nolo contendere or has been found guilty, *except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.*" 18 U.S.C. App. Rule 32(c)(1) (1976) (emphasis added). The amendment thus provided that a presentence report could be

disclosed to the court not only when a defendant had pleaded guilty or been found guilty, but also when the defendant had consented to such disclosure. Congress adopted that amendment without change in 1975. Pub. L. No. 94-64, § 3(5)-(10), 89 Stat. 371-372.

Respondent argues (Resp. Br. 10) that the change in Rule 32 to permit disclosure of a presentence report with the defendant's consent demonstrates "that Congress intended that a guilty plea is neither accepted nor binding until the district court has also accepted the plea agreement." Respondent relies in particular on the following passage from the Advisory Committee Notes that discussed that change in Rule 32:

> Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.
>
> It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel.
>
> Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the

> necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

Proposed Amendments to the Federal Rules of Criminal Procedure, 62 F.R.D. 271, 323 (1974) (citations omitted). Respondent argues that the 1975 change permitting the court to review a presentence report with the defendant's consent would have been unnecessary if the court had authority to accept a guilty plea before accepting an accompanying plea agreement. He reasons that if a court had authority to accept the guilty plea while deferring consideration of the plea agreement, the court could review the presentence report even without the defendant's consent under Rule 32 as it stood both before and after the amendment.

b. Respondent's attempt to derive from the amendment to Rule 32 a prohibition on a district court's ability to accept a guilty plea before accepting an accompanying plea agreement is implausible. The Advisory Committee has no authority to impose requirements of that sort by omitting them from the Rules themselves, but including them in its notes to a proposed rule change. Had the Advisory Committee intended to impose the rule respondent claims, it could easily have done so in the text of the contemporaneous amendments it was proposing—and which Congress in relevant part adopted—to Rule 11.[1]

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[1] For example, the Advisory Committee could have made respondent's requirement explicit simply by adding four words to its amendment to Rule 11(e)(2) regarding deferral of a decision on the plea agreement. The four words are indicated in italics below:

> If the agreement is of the type specified in subdivision (e)(1)(A) or (C) [calling for dismissal of charges or a specific sentence], the court may accept or reject the agreement *and accompanying guilty plea*, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

The reason that the Advisory Committee did not adopt respondent's requirement in the text of Rule 11 is that the Committee did not intend to impose such a requirement. The 1975 amendments codified plea bargaining procedures for the first time. There was therefore some doubt as to how the new procedures would be most effectively implemented. As the above quotation from the 1974 Advisory Committee Notes indicates, the Committee was particularly concerned about plea agreements that provided for the "sentence to be imposed"—*i.e.*, specific-sentence agreements under Rule 11(e)(1)(C). Accordingly, the Committee's likely intent was to afford a district court the opportunity—but not to impose the requirement—of deferring acceptance of a guilty plea in such specific-sentence cases until it had seen the presentence report. If a court wanted to defer decision on a guilty plea, however, the existing provisions of Rule 32 would have precluded the court from reviewing the presentence report, since the report was available to the court only after the defendant pleaded guilty or was found guilty. Therefore, the Committee amended Rule 32 to add the provision for release of a presentence report to the court with the defendant's consent, even before the acceptance of the guilty plea.[2]

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[2] Although courts rarely decide to defer their decision on whether to accept a plea of guilty, that circumstance does occasionally arise. See, *e.g.*, *United States* v. *Washman*, 66 F.3d

Nothing in the text of the amendment or the Advisory Committee Notes suggests that the Committee intended that the plea-deferral procedure would be mandatory if there were a plea agreement.

In addition, the Advisory Committee was aware that a presentence report could be prepared before the guilty plea colloquy, although that practice was and is relatively rarely used. See 62 F.R.D. at 323 (noting "authority to have a presentence report *prepared* prior to the acceptance of the plea of guilty," and citing *Gregg* v. *United States*, 394 U.S. 489, 491 (1969)); *United States* v. *Ball*, 547 F. Supp. 929, 933 (E.D. Tenn. 1981). In such cases, too, the amendment to Rule 32 would permit a judge to review the report before deciding whether to accept the guilty plea.

c. In any event, the relevant Advisory Committee Notes in this case are not the notes the Committee prepared in 1974 regarding the disclosure of presentence reports. The issue here is whether the defendant may avoid the "fair and just reason" standard of Rule 32(e) for withdrawal of a guilty plea before

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210, 212 (9th Cir. 1995) ("[T]he record clearly indicates that the magistrate judge did not accept [defendant's] plea at the change of plea hearing, but indicated that the court's decision as to whether to accept the plea would be deferred until the district court had an opportunity to review [defendant's] presentence report."); *United States* v. *Bunch*, 730 F.2d 517, 518 & n.1 (7th Cir. 1984); see also *United States* v. *Ewing*, 957 F.2d 115, 118 n.2 (4th Cir.) ("There is no reason apparent to us that the district court could not have deferred acceptance of the *guilty plea* as well as the *plea agreement* until consideration of the presentence report, but this was not what was done."), cert. denied, 505 U.S. 1210 (1992). In cases like *Washman* and *Bunch*, the amendment to Rule 32 permitting review of the presentence report with the consent of the defendant is essential.

sentencing. The "fair and just reason" standard, however, was added to Rule 32 only in 1983.[3] It is the notes discussing that amendment—not the notes discussing the amendment to the presentence report disclosure requirements in 1975—that provide a useful guide to the Committee's intent. Cf. *Libretti* v. *United States*, 116 S. Ct. 356, 364 (1995) ("We cannot agree that the Advisory Committee's Notes on the 1972 amendment to Rule 31(e) shed any particular light on the meaning of the language of Rule 11(f), which was added by amendment to Rule 11 in 1966.").

When it added the "fair and just reason" standard to the statute in 1983, the Advisory Committee canvassed various positions taken by courts on the circumstances under which a defendant should be able to withdraw a guilty plea before sentencing. The Committee did not consider the possibility that a court might permit the defendant absolute discretion to withdraw a guilty plea. The Committee did note, however, that "[s]ome courts proceed as if any desire to withdraw the plea before sentence is 'fair and just' so long as the government fails to establish that it would be prejudiced by the withdrawal." *Amendments to Rules*, 97 F.R.D. 245, 313 (1983). Other courts, by

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[3] Before 1983, Rule 32 provided a standard ("manifest injustice") for withdrawal of a guilty plea after sentencing, but it was silent regarding the standard for withdrawal before sentencing. The Rule provided:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

18 U.S.C. App. Rule 32(d) (1976).

contrast, took the position that "there is no occasion to inquire into the matter of prejudice unless the defendant first shows a good reason for being allowed to withdraw his plea." *Ibid.*

The Committee resolved the dispute "by requiring that the defendant show a 'fair and just' reason." 97 F.R.D. at 313. The Committee explained that the current provisions of Rule 11 supported that position:

> Rule 11 now provides for the placing of plea agreements on the record, for full inquiry into the voluntariness of the plea, for detailed advice to the defendant concerning his rights and the consequences of his plea and a determination that the defendant understands these matters, and for a determination of the accuracy of the plea. Given the great care with which pleas are taken under this revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence whenever the government cannot establish prejudice.
>
> > Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but "a grave and solemn act," which is "accepted only with care and discernment."

Id. at 313-314 (quoting *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.) (en banc), cert. denied, 421 U.S. 1013 (1975) (quoting in turn *Brady* v. *United States*, 397 U.S. 742, 748 (1970))).

At the time it amended Rule 32 to incorporate the "fair and just reason" standard, therefore, the Advisory Committee made unmistakable its intent that that standard would apply once the guilty plea had been tendered and accepted in compliance with Rule 11's careful procedures. Under respondent's view, however, in the large number of cases in which a court defers the decision whether to accept an accompanying plea agreement, the defendant "[is] free to withdraw his tendered guilty plea at will" until the court decides whether to accept the agreement. Resp. Br. 17. As we explain in our opening brief (at 22-23), that means that in those cases, respondent's "at will" standard would displace Rule 32(e)'s "fair and just reason" standard from the time of the Rule 11 colloquy until at or near sentencing. That view is inconsistent with the text of Rule 32(e) (which applies at any time "before sentence is imposed") and with the Advisory Committee's intent to ensure that the Rule 11 colloquy be treated as something more than "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim."[4]

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[4] Respondent argues (Resp. Br. 17-22) that the "fair and just reason" standard that this Court originally articulated in *Kercheval* v. *United States*, 274 U.S. 220 (1927), would not have applied to the circumstances of this case. We disagree with respondent's interpretation of *Kercheval*; in our view, a guilty plea under modern practice would be sufficiently final to trigger the imposition of the "fair and just reason" standard under the common law rule of *Kercheval*, even without the authority of Rule 32(e). This case, however, is not governed by the common law rule of *Kercheval*. It is governed by the 1983 amendment to Rule 32—what is now Rule 32(e)—that applies

2. Respondent argues (Resp. Br. 26) that his rule precluding a court from accepting a guilty plea until the court has accepted an accompanying plea agreement should be adopted because "it is manifestly unfair to bind a defendant to an agreement before the prosecutor and the court are likewise bound and before the defendant can rely on the agreement." The premise of that argument, however, is incorrect.

After a court accepts a guilty plea, the defendant and the government are each bound to the plea agreement to precisely the same extent. The defendant has usually already performed the greater part of his commitment—the tender of the guilty plea. Although the government's performance may become due over a period of time (*e.g.*, the dismissal of charges will occur only after the court accepts the plea agreement), the government may not simply repudiate its commitments or walk away from the agreement. See *Santobello* v. *New York*, 404 U.S. 257, 262 (1971).[5]

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the "fair and just reason" standard to motions to withdraw a guilty plea before sentencing. Both Rule 32(e) itself and the Advisory Committee Notes quoted in the text make clear that the "fair and just reason" standard was intended to be applicable from the time that a plea was accepted in accordance with Rule 11's requirements until the time of sentence.

[5] Respondent argues (Resp. Br. 26-27) that courts have held that "before the court accepts the agreement the defendant cannot reasonably rely upon it" and that we seek the "anomalous result that a defendant be bound by an agreement during a period of time when he or she cannot rely upon the agreement." The cases cited by respondent, however, stand for quite different propositions, *i.e.*, that the defendant cannot rely on the hope that a court would accept a plea agreement, in a case where the court deferred decision on the agreement, *United States* v. *Livingston*, 941 F.2d 431, 436 (6th Cir. 1991); that the defendant may not rely on an "oral plea agreement"

The government's performance may be conditional on the court's acceptance of the plea agreement, but that does not alter the fact that the government is bound by the agreement unless the court rejects it. If the court does reject it, the parties will be returned to the position each was in before the agreement was entered; the defendant has the right under Rule 11(e)(4) to withdraw his guilty plea and the prosecution is released from whatever commitments it made.[6] As with many other sorts of contracts, neither the fact that the agreement is "conditional" in this sense,

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that is never put before the court and that the court would not have accepted had it been informed of it, *United States* v. *Wessels*, 12 F.3d 746, 752-753 & n.2 (8th Cir. 1993), cert. denied, 513 U.S. 831 (1994); and that the defendant may rely on—and enforce—a plea agreement in a case in which the court has accepted both the plea and the plea agreement, *United States* v. *Blackwell*, 694 F.2d 1325, 1338-1339 (D.C. Cir. 1982) ("There is no dispute that the trial judge here accepted the guilty plea and that its bargained-for predicate, the dismissal of the gun charge at the time of sentencing, was set out on the record and accepted by her as well."). Although some comments in *Blackwell* fail to distinguish between the plea and the plea agreement, the distinction was of no consequence in that case. None of the cases supports respondent's claim that the prosecutor is not bound by the agreement before the court accepts it.

[6] Respondent refers (Resp. Br. 21) to the Rule 11(e)(4) withdrawal procedure as a circumstance in which "Rule 32(e)'s 'fair and just reason' standard does not apply." That statement is misleading. It is true that a defendant in that situation need not make a particularized showing of a "fair and just reason" to withdraw his plea. But that is because the fact that the district court has rejected the plea agreement automatically provides such a "fair and just reason." There is *no* provision of the Rules that permits a defendant to withdraw an accepted guilty plea for no reason at all or that supports the creation of such a right of free withdrawal.

nor the fact that the bargain often involves an exchange of a performance (the guilty plea) in return for a promise (the prosecutor's future action), makes it "manifestly unfair" (Resp. Br. 26) to bind both parties to their commitments. See Restatement (Second) of Contracts § 225 (effects of non-occurrence of a condition), § 377 (restitution in cases of non-occurrence of a condition) (1981).[7]

Respondent also argues (Resp. Br. 27) that "in light of the complexity and determinate nature of the Sentencing Guidelines, allowing defendants to review the presentence report before they are bound by the agreement serves the important function of having defendants understand the implications of the agreements they enter." As we explain in our opening brief (at 20), however, the Federal Rules squarely rejected the argument that a defendant should generally have the opportunity to review his presentence report before finally committing himself to his plea. Moreover, even under respondent's view, defendants who plead guilty without an agreement—

[7] Respondent asserts (Resp. Br. 24 n.9) that in our brief in opposition in *Cordova-Perez* v. *United States*, No. 95-9101, we took a different position. We explained in our reply brief at the certiorari stage of this case that our brief in opposition in *Cordova-Perez* did not endorse the Ninth Circuit's view that deferral of a decision on a plea agreement as a general rule renders acceptance of a plea agreement conditional. See U.S. Reply Br. 6-8. Indeed, our long-standing position has been that "it is clear that Rule 11 permits withdrawal of a guilty plea * * * only if the court rejects the agreement. Unless the court rejects the agreement, therefore, the right to withdraw the plea is governed entirely by Rule 32(d)." U.S. Brief in Opp. at 7, *Ellison* v. *United States*, cert. denied, 479 U.S. 1038 (1987) (No. 86-5688). (We are supplying respondent with a copy of our brief in opposition in *Ellison*.)

or with only a recommended-sentence agreement under Rule 11(e)(1)(B)—would have no opportunity to review their presentence reports before being bound to their guilty pleas. There is no reason for treating those defendants differently with respect to advance review of their presentence reports from defendants who, like respondent, have obtained a dismissal-of-charges or specific-sentence agreement.

3. Respondent argues (Resp. Br. 29-40) that the Ninth Circuit's rule of free withdrawal will not inject instability into the plea bargaining process.

Initially, respondent minimizes the significance of the Ninth Circuit's rule of free withdrawal by arguing that the rule would not apply to all plea bargains. But respondent concedes that the Ninth Circuit's rule applies at least to agreements that provide for dismissal of charges and agreements that provide for a specific sentence. See Resp. Br. 30. Although we agree with respondent that specific-sentence agreements are "very rare," we also agree with respondent that dismissal-of-charges agreements "appear to be the most common." *Ibid.* The parties in this case therefore agree that the Ninth Circuit's rule would apply to at least a sizable number of guilty pleas.

Respondent also downplays (Resp. Br. 31) the dangers of "manipulation or gamesmanship" inherent in a rule of free withdrawal because, in his view, there are "effective tools to eliminate any incentives" for defendants to abuse the rule. For example, respondent claims that agreements providing for dismissal of charges either are "relatively empty promises which offer very little to defendants," *id.* at 32, or "guarantee such significant sentence protection that few defendants would seek to withdraw from those agreements," *id.* at 33. Respondent also argues that

defendants will not attempt to withdraw from plea agreements because their guilty pleas are generally essential to obtaining a two- or three-level reduction in their offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1 (1996). See Resp. Br. 33-34.

To be sure, in many plea agreements, the nature of the agreement and the value of the promises exchanged will be sufficiently valuable to each of the parties that neither will at any point want to withdraw from the agreement. Rule 32(e)'s "fair and just reason" standard, however, was adopted to address situations in which the defendant does want to withdraw—because of a change of circumstances, a change of mind, or some other reason. That defendants may choose in many (or even most) cases to adhere to their guilty pleas provides no basis for dispensing with Rule 32(e)'s "fair and just reason" standard in cases in which the defendant *does* want to withdraw.

Moreover, respondent's dismissal (see Resp. Br. 39-40) of the danger of manipulation and gamesmanship is unjustified. Respondent argues (*id.* at 38) that "defendants are * * * harmed by delay" and may not have any desire to postpone a trial. It is of course true that some defendants are anxious to have a trial occur as quickly as possible. But there are undoubtedly many defendants who believe they would benefit from a trial delay. For example, a defendant indicted along with a number of co-conspirators may be unable to obtain a severance under Federal Rule of Criminal Procedure 14, but would nonetheless like to delay his own trial in order to be tried separately from his co-conspirators. Where a government witness's health or future availability is in doubt, a defendant may seek

a delay in hopes that the witness will become unavailable. And, where a defendant is at liberty on bail, a defendant may well have an incentive to delay trial as long as possible.

In those and other situations, the Ninth Circuit's rule of free withdrawal offers defendants an opportunity to plead guilty and then later withdraw from the guilty plea, simply to obtain an unjustified and unwarranted delay of trial. Indeed, respondent would apparently allow the prosecution as well to withdraw from a plea agreement for no reason at all, at any time until the agreement had been accepted by the district court. See Resp. Br. 18. That would create a highly unstable process, in which neither party could rely on the other's continued adherence to its commitments.[8]

Moreover, even in cases in which the defendant would not exercise his right of at-will withdrawal, the Ninth Circuit's approach injects instability into the

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[8] The possibility that the prosecution also could withdraw from the plea agreement could be highly unsettling to preparation of the presentence report. As a practical matter, the report would have to be prepared in most cases during the period when either side could freely withdraw from the agreement. That creates a dilemma for the defendant. The presentence report ordinarily must include substantial information that can be gathered most efficiently—and most accurately—only with the defendant's cooperation. Yet a defendant who cooperated with preparation of the presentence report would be taking the risk that the information provided could be used against him by a prosecutor who, having read the presentence report, decides simply to withdraw from the deal. Even if the presentence report would not itself be admissible evidence under Rule 11(e)(6), nothing would stop the prosecutor from making use of the information in the report in other ways if the prosecutor decided to withdraw from the agreement and force the defendant to trial.

plea bargaining process because there will always remain the threat that the defendant will decide to walk away from the bargain at some time before sentencing. The prosecution's response could be to make plea bargains available to fewer defendants, especially where the prosecution was aware that possible withdrawal of the plea could give the defendant an unjustified strategic advantage.[9] That result would increase the burdens on all parties—the prosecution, the defendants, and the courts—without offering any compensating advantage.

* * * * *

[9] Respondent cites (Resp. Br. 38-39) statistics showing that the rate of guilty pleas in the Ninth Circuit has increased slightly in the year ending September 30, 1996, as compared to the prior year. The Ninth Circuit's decision in this case was entered on April 30, 1996. Therefore, the year for which respondent cites statistics included only five months after the Ninth Circuit's decision in this case. The statistics do not distinguish between the rate of guilty pleas during that five-month period and the rate during the balance of the year at issue. Nor does respondent attempt to control for any of the numerous other factors that could have otherwise accounted for an increase, decrease, or stability in the rate of guilty pleas during the periods of time to which he refers. Moreover, the Ninth Circuit's decision may well have had little effect on the behavior of prosecutors or defendants until it was broadly disseminated and, perhaps, until the government's petition for rehearing was denied on July 29, 1996. Thus, the statistics cited by respondent are of no value without a far more detailed analysis than that provided by respondent. Finally, even if the statistics were of value, the rule of withdrawal would inject instability into the plea bargaining process as explained in text and reduce respect for judicial proceedings, even if most cases proceeded to sentencing as before.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

WALTER DELLINGER
Acting Solicitor General

APRIL 1997

No. 96-667

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

ROBERT E. HYDE, Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 28 U.S.C. § 1915, this Court's Rule 39.4, and 18 U.S.C. § 3006A(d)(6), the respondent, Robert E. Hyde, moves for leave to proceed in forma pauperis. In support of his motion he states:

1. This proceeding is a petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit dated April 30, 1996, reversing his conviction in the United States District Court for the Northern District of California.

2. The Ninth Circuit found him eligible for appointment of counsel under the Criminal Justice Act and appointed undersigned counsel on April 10, 1995.

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WHEREFORE, petitioner prays that this court grant him leave to proceed in this Court in forma pauperis.

Respectfully submitted,

THE RESPONDENT

Dated: December 23, 1996

By: JONATHAN D. SOGLIN
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Attorney for Respondent

No. 96-667

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF IN OPPOSITION

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Attorney for Respondent

QUESTION PRESENTED

Does deferment of acceptance of a plea agreement necessarily carry with it deferment of acceptance of a guilty plea? If so, under the Federal Rules of Criminal Procedure, must a defendant show a "fair and just reason" for rescinding a tendered guilty plea, when the court has not yet accepted the plea agreement on which the guilty plea depends?

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* The parties to the proceedings in the court of appeals included the United States of America and respondent, Robert E. Hyde.

TABLE OF AUTHORITIES

No. 96-667

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF IN OPPOSITION

Respondent, Robert E. Hyde, respectfully opposes the United States' petition to this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 30, 1996, vacating his conviction entered in the Northern District of California.

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Ninth Circuit was filed on April 30, 1996, and was initially reported at 82 F.3d 319. As amended and superseded on denial of rehearing the opinion is published at 92 F.3d 779. Petition for Writ of Certiorari ("Pet.") App. 1a-7a. The district court's unpublished order denying respondent's motion to withdraw was filed on July 19, 1994. Pet. App. 8a-18a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 30, 1996. The United States' petition for rehearing was denied on July 29, 1996. The petition for certiorari was timely filed on October 28, 1996, the first business day following the ninetieth day for filing.

RULES INVOLVED

Rules 11 and 32(e) of the Federal Rules of Criminal Procedure and Section 6B1.1(c), p.s., of the United States Sentencing Guidelines are involved in this case, and are reproduced as an appendix to the Petition for Certiorari. Pet. App. 19a-26a.

STATEMENT OF THE CASE

The respondent's direct appeal followed a guilty plea on federal criminal charges alleging mail and wire fraud and arose out of his conviction and the 30-month guideline sentence imposed under the Sentencing Guidelines.

An eight-count indictment, filed in the Northern District of California on December 13, 1991, charged respondent with three counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts One, Four and Five); two counts of receipt of stolen property, in violation of 18 U.S.C. § 2315 (Counts Two and Three); and three counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts Six, Seven and Eight). CA9 ER 1-11.[1]

[1] Respondent's Excerpts of Record filed in the court of appeals are referred to as CA9 ER.

On November 29, 1993, the day set for jury trial, respondent entered a guilty plea to two counts of wire fraud (Counts One and Four) and two counts of receipt of stolen property (Counts Two and Three). Id. at 66-67. The district court, however, deferred acceptance of the plea agreement until after review of the Presentence Report. Id. at 67.

Pursuant to the plea agreement and in exchange for respondent's guilty pleas to Counts One through Four, the government agreed to move to dismiss Counts Five through Eight of the indictment and not to bring further charges against respondent in connection with his involvement with two loan brokerage firms. Id. at 21-23. In the plea agreement, the government also stipulated to sentencing calculations for respondent's base offense level, the grouping of offenses, role enhancement, and respondent's adjusted offense level. Id. at 24-25. The agreement also provided how restitution would be calculated. Id. at 25. Finally, the parties agreed the sentencing stipulations were not binding on the district court judge: "The district court will be free to make its own determinations pursuant to the Guidelines as to the appropriate sentence to be imposed." Id. at 26.

The agreement stated that it was made under Federal Rule of Criminal Procedures 11(e)(1)(B).[2] Id. at 21. As the agreement

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[2] A plea agreement under Rule 11(e)(1)(A) requires the government to "move for dismissal of other charges." An agreement under Rule 11(e)(1)(B) requires the government to "make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court." An agreement under Rule 11(e)(1)(C) requires the government to

required that the government both dismiss charges and stipulate to sentencing calculations which were not binding on the district court, it was also a Rule 11(e)(1)(A) agreement.[3]

On December 23, 1993, less than a month after the change of plea hearing, respondent moved to withdraw his guilty plea on the grounds both that the agreement was made under duress and that the district court failed properly to advise him of the consequence of his plea, as required by Fed. R. Crim. P. 11(e)(2).[4] CA9 ER 70-72. The district court held an evidentiary hearing on June 2, 1994, and denied the motion to withdraw the guilty plea in a written order dated July 19, 1994, finding that respondent had failed to show that his guilty plea was coerced. Pet. App. 17a; CA9 ER 79, 85-95.

On February 28, 1995, the district court sentenced respondent to a 30-month term of imprisonment consisting of concurrent 30-

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"agree that a specific sentence is the appropriate disposition of the case."

[3] In denying respondent's motion to withdraw his guilty plea, the district court agreed with the government that the statement in the plea agreement that it was a Rule 11(e)(1)(B) agreement was a typographical error and that it was really a Rule 11(e)(1)(A) agreement. Pet. App. 17a. On appeal, respondent argued that the agreement was a hybrid containing both Rule 11(e)(1)(A) and Rule 11(e)(1)(B) provisions; the government stuck with its argument that it was solely a Rule 11(e)(1)(A) agreement. Appellant's CA Br. 8-9; Gov't CA Br. 21-22. Although the court of appeals did not resolve this dispute, petitioner now agrees that the agreement "could be construed to fall within [Rule 11(e)(1)(B)]." Pet. 14 n.3.

[4] Although the motion was not filed in the district court until January 10, 1994, respondent signed it in prison on December 23, 1993, and the district court treated it as filed on that earlier date. CA9 ER 70-72; Pet. App. 10a.

months terms on each of Counts One through Four.[5] On March 7, 1995, the district court entered judgment. CA9 ER at 120-21, 127. Respondent timely appealed. Id. at 140.

On April 30, 1996, the Ninth Circuit reversed respondent's conviction, concluding that the district court erred by denying respondent's motion to withdraw his guilty plea.[6] The court explained, "[i]f the [district] court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement." Pet. App. 4a; 92 F.3d at 781. In so ruling, the court rejected the United States' argument that Rule 32(e) requires a defendant to show a "fair and just reason" for withdrawal from a guilty plea, even before acceptance of the plea agreement. The court explained that the district court's acceptance of the guilty plea did not trigger the requirements of Rule 32(e) because:

> "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea."

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5 The district court also ordered that the imprisonment be followed by three years of supervised release, and that Mr. Hyde pay a $5,000 fine and restitution in the amount of $477,990.00. CA9 ER 127-132. Mr. Hyde has served the entire 30-month term of imprisonment and was on supervised release when the court of appeals vacated his conviction.

6 The court of appeals did not discuss respondent's other challenges to his conviction and sentence.

Pet. App. 3a; 92 F.3d at 780 (quoting United States v. Cordova-Perez, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, --- U.S. ---, 117 S. Ct. 113 (Oct. 7, 1996) (No. 95-9101)). Noting the government's concern that United States Sentencing Commission policy statement in U.S.S.G. § 6B1.1(c) requires the district court to defer acceptance of certain types of plea agreements pending preparation of the presentence report, and citing Rule 11(e)(2), which makes such deferment discretionary, the court of appeals suggested, "if the Sentencing Commission's interference with district court discretion causes practical difficulties regarding pleas, as well it may, that is a situation to which the Commission can turn its attention." Pet. App. 3a-4a; 92 F.3d at 781.

Judge Ferguson concurred, restating his dissent in Cordova-Perez:

> I continue to believe [Cordova-Perez] was decided incorrectly and that an injustice was done. Yet the government insisted upon the result. Now it would like us to disregard Cordova-Perez, which of course would be a monumental disaster. The government cannot have it both ways. When it advocated the result in Cordova-Perez, it must live with the mistake.

Pet. App. 5a; 92 F.3d at 781.

On July 29, 1996, the court of appeals unanimously denied the United States' petition for rehearing and suggestion for rehearing en banc. Pet. App. 6a-7a.

STATEMENT OF LOWER COURT JURISDICTION UNDER RULE 14.1(i)

The district court had jurisdiction in this matter pursuant to 18 U.S.C. § 3231, in that the indictment alleged the commission

of federal criminal offenses. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, invoked by a timely notice of appeal pursuant to Fed. R. App. P. 4(b).

REASONS FOR DENYING THE WRIT

1. **Any Conflict Created by the Court of Appeals' Decision Would Be Better Left for Resolution by the Rules Committee or the United States Sentencing Commission.**

Petitioner argues that review by this court is necessary because "[t]he rule adopted by the court of appeals has damaging implications for the federal criminal system." Pet. 12. This concern, to the extent it is substantiated, is best resolved by amendment either to the rules of procedure or to the sentencing guidelines.[7]

Petitioner's worry is that the interplay between the federal rules, the sentencing guidelines, and the court of appeals decision in this case will "encourage[] defendants to engage in manipulation and gamesmanship." Pet. 15. Under United States Sentencing Guideline § 6B1.1(c), p.s., deferral of acceptance of the plea agreement pending preparation of the presentence report is mandatory where the defendant has pleaded guilty pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C).[8] The court of appeals' decision in this case would, as the government forebodes, allow defendants

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7 As discussed under Part 2, *infra*, petitioner's assertions about the vast numbers of cases affected by the court of appeals holding are not substantiated.

8 As the court of appeals noted, the extent to which a Sentencing Commission policy statement which does not interpret a guideline may be binding is not definitively resolved. Cf. Stinson v. United States, 508 U.S. 36 (1993).

in some cases to withdraw a guilty plea at will after review of the presentence report, perhaps months after the Rule 11 hearing. Pet. 13, 15. The government assumes, without explaining why, that it would be undesirable for defendants to plead guilty only when they understand all of the likely consequences. To the contrary, a large number of appeals and post-conviction petitions would be eliminated by allowing access to full pre-sentence information in these cases. On the other hand, in some cases, the modest amount of judicial time involved in the Rule 11 proceeding would be wasted when a certain number of defendants later realize that they stand to gain very little by waiving their constitutional right to stand trial. Be that as it may, this practical concern would be better addressed by amendment to the guidelines, changes in procedures, and amendment to the rules, rather than review by the Court, if any change in the rules is thought desirable.

As suggested by the court of appeals in this case (Pet. App. 4a), the Sentencing Commission could amend § 6B1.1(c), p.s., so that deferment of acceptance of Rule 11(e)(1)(A) and 11(e)(1)(C) agreements is not described as mandatory. This is already the case with Rule 11(e)(1)(B) agreements, which the district court can accept at the Rule 11 hearing. U.S.S.G. § 6B1.1(c). Earlier acceptance of the agreements would bind the parties earlier and eliminate the late withdrawals petitioner fears. An amendment to section 6B1.1(c) could also eliminate the conflict with Rule 11(e)(2) which makes the deferment of acceptance of type (A) and (C) agreements permissive.

If earlier acceptance of the agreement raises concerns that acceptance might come before review of the presentence report, then another solution might be earlier preparation of presentence reports. The rules permit preparation and review of the presentence report prior to acceptance of the guilty plea and plea agreement. Fed. R. Crim. P. 32(b)(1), (3), and (6); United States v. Kurkculer, 918 F.2d 295, 301 (1st Cir. 1990) (Rule 32 was modified to permit the district court, with the defendant's permission, to see the presentence report prior to accepting a guilty plea).

Pre-plea preparation of presentence reports would not only permit earlier acceptance of plea agreements, but would better ensure that the defendant enters the guilty plea with full knowledge. See United States v. Puckett, 61 F.3d 1092, 1099 (4th Cir. 1995) (court "sympathetic" to defense counsel's concerns that presentence report should be prepared during plea negotiations and prior to acceptance of the guilty plea). Such procedures would also ensure that guilty pleas more accurately reflect the seriousness of the offense.

Even without a pre-plea presentence report, prosecuting attorneys can avoid late withdrawals of guilty pleas by complying with another suggestion of the Sentencing Commission: "prior to entry of a plea of guilty ... to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." U.S.S.G. § 6B1.2, comment. Such early disclosure would eliminate

most surprises in the presentence report and thus significantly reduce the impetus for a defendant to withdraw a guilty plea late in the proceeding.

Amendment of the Federal Rules of Criminal Procedure could also resolve any conflict raised by the court of appeals' decision. Petitioner argues that the court of appeals' decision is inconsistent with Rules 11(e)(4) and 32(e), which address a defendant's withdrawal from a guilty plea.

Rule 11(e)(4) provides that, "[i]f the court rejects the plea agreement, the court shall ... afford the defendant the opportunity to then withdraw the plea." Rule 32(e) provides that, "[i]f a motion to withdraw a plea of guilty ... is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Petitioner argues that the court of appeals' holding in this case renders Rule 11(e)(4) "superfluous" and is in conflict with Rule 32(e). Pet. at 9-10. If the holding is inconsistent with the rules, which respondent does not concede, an amendment to the rules could eliminate the conflict.[9] Rule 32(e) could be amended to clarify its scope. If the intent was that the "fair and just reason" requirement apply before acceptance of the plea agreement, the rule could be amended to say so explicitly. Likewise, if the intent was as interpreted by the court of appeals in this case, Rule 32(e) could be amended to state expressly that prior to

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9 As explained under Point 3, *infra*, the court of appeals' decision is not inconsistent with the rules.

acceptance of a plea agreement, the defendant is free to withdraw the plea at will.

This Court has noted that it is Congress' intent that conflicts concerning the United States Sentencing Guidelines be resolved, not by this Court, but by the United Sentencing Commission. Braxton v. United States, 500 U.S. 344, 347-48 (1991). In charging the Commission with the duty of reviewing and revising its Guidelines, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348. Because the Commission has the duty to review and revise the Guidelines and because the Commission has the power to decide whether amendments to the Guidelines should be given retroactive effect, this Court has recognized that it must be "more restrained and circumspect in using [its] certiorari power as the primary means of resolving such conflicts." Ibid.

The Court has taken a similar position with respect to interpretive questions created by the Federal Rules of Criminal Procedure, holding that such inconsistencies should be left to "resolution by the rule-making process." Lott v. United States, 367 U.S. 421, 425-26 & n.9 (1961).

Such restraint is appropriate in this case where the issue is rule-based and can be resolved best through the rule-making and guideline-amending processes. For this reason, the writ should be denied.

2. Although There Is An Inter-Circuit Split, Review By This Court Is Premature.

As noted by petitioner (Pet. 11), the decision of the court of appeals is in conflict with decisions of the Fourth and Seventh Circuits. United States v. Ewing, 957 F.2d 115 (4th Cir.), cert. denied, 505 U.S. 1210 (1992); United States v. Ellison, 798 F.2d 1102 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987). The conflict is neither deep nor engrained, however. Furthermore, there is no evidence that many cases are affected by the court of appeals' decision. Review is, in any event, premature.

In urging a grant of certiorari, petitioner suggests that a great many cases will be affected by the court of appeals' decision. Petitioner's floodgates argument is unsupported by the record or by other sources. Petitioner cites the statistic that 95% of all criminal cases are disposed of by guilty pleas. Pet. at 1, n.2. Without citation to any authority, the petitioner also claims that "[i]n most circumstances" and "ordinarily" the district court defers acceptance of the plea agreement pending preparation of the presentence report. Pet. at 7, 15. Petitioner's lack of authority for this assertion is important. Petitioner argues that review by this Court is warranted because "the [court of appeals'] decision threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases." Pet. at 7 (emphasis added). While the majority of cases are resolved no doubt by guilty pleas, there is no evidence of how often the district court defers acceptance of a plea agreement.

And, of the cases where the district court defers acceptance of the plea agreement, there is no evidence of how often defendants do or would seek to withdraw from guilty pleas. The paucity of cases addressing this issue is perhaps the best evidence that this is not a frequent occurrence. The government cites two in a ten-year period, hardly a strong indication of crisis. As the impact of the court of appeals' decision is not as vast or dire as portrayed by petitioner, review is not warranted.

Petitioner warns that the holding of the court of appeals "encourages defendants to engage in manipulation and gamesmanship." As examples, petitioner suggests that a defendant could delay a trial several months by withdrawing his plea just before sentencing or the defendant could "delay his decision whether to plea guilty until he has had the opportunity to review the presentence report." Pet. 15. These concerns are not present in this case. Respondent moved to withdraw his guilty plea less than one month after his guilty plea, and long before the presentence report was prepared and disclosed to the parties. Pet. App. 9a-10a; Presentence Report, at 1. If these are petitioner's concerns, review of this issue should await a case which presents those facts.

As noted by petitioner (Pet. 11), only three of the federal circuits have ruled on this issue in published decisions, and those three circuits have each only published one decision on the issue. Review would be better left for a case decided after the issue has been considered and discussed by more of the lower courts. In fact, the scope of the court of appeals' decision may

be fine-tuned in the near future. A recent district court decision held that the Ninth Circuit's decision in this case applies only to Rule 11(e)(1)(A) and 11(e)(1)(C) agreements, and not to Rule 11(e)(1)(B) agreements. United States v. Lopez-Reyes, 933 F.Supp. 957, 959-60 (S.D. Cal. 1996). Should the Lopez-Reyes defendant or another similarly situated defendant appeal, the court of appeals' may narrow the scope of its earlier decision.[10]

At a later date, the impact of the court of appeals' decision will be more apparent, the nuances of the legal argument will be more finely tuned, and the Sentencing Commission and Advisory Committee on Rules will have had an opportunity to amend the guidelines and rules to clear up ambiguity and eliminate conflict. For these reasons, review by this Court is premature at this time.

3. The Court Of Appeals Ruling Is Not Inconsistent With The Rules Of Procedure.

Petitioner argues that the court of appeals' holding in this case is in conflict with Rule 32(e) and renders Rule 11(e)(4) "superfluous." Pet. at 9-10.

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10 An appeal by the Lopez-Reyes defendant appears likely. Following denial of his motion to withdraw his plea, but before he was sentenced, the defendant filed in the Ninth Circuit a "Petition for Permission to Appeal" under 28 U.S.C. § 1292(b). In an unpublished order, the Ninth Circuit construed the petition as a notice of appeal and dismissed the appeal for lack of jurisdiction. United States v. Lopez-Reyes, No. 96-80288 (9th Cir. Sept. 13, 1996). Given his desire to withdraw from the plea agreement and given his first attempt to appeal, Lopez-Reyes, who is still awaiting sentencing (United States v. Lopez-Reyez, No. CR-95-478 (S.D. Cal.)), is apt to pursue an appeal of the district court's denial of his motion to withdraw after judgment is entered.

There is no conflict with Rule 32(e), because the court of appeals' decision is premised on the fact that deferment of acceptance of the plea agreement necessarily carries with it deferment of acceptance of the guilty plea. Pet. App. 3a. In effect, there was no final acceptance of the guilty plea, even though the district court stated that it "accepted" the plea. Ibid. The guilty plea was inherently conditional, not having effect until the district court accepted the agreement. This is the position taken by the court of appeals in Cordova-Perez, holding that after a guilty plea the district court can reject the plea agreement, vacate the guilty plea, and order that the defendant be tried. Cordova-Perez, 65 F.3d at 1556. As emphasized in Judge Ferguson's concurrence in this case, the government did not disagree with this proposition when it was to its advantage in Cordova-Perez. Pet. App. 5a.

Petitioner suggests that Cordova-Perez is not controlling because in that case the district court rejected the plea agreement. Pet. 10 n.1. But the significance of Cordova-Perez is not what it said about a defendant's right to withdraw (in fact there is no indication that the defendant in that case wanted to withdraw), but what it says about the effect of deferment of acceptance of the agreement. Petitioner does not address this aspect of the Cordova-Perez decision, although it is the aspect which is critical to its role as precedent for the instant case.

In Cordova-Perez, the district court, as in this case, accepted the guilty plea but not the plea agreement. Cordova-Perez, 65 F.3d at 1554. After reviewing the presentence report,

however, the district court in Cordova-Perez rejected the plea agreement, vacated the defendant's guilty plea to a lesser offense, and reinstated the original indictment. Ibid. On appeal, the defendant argued that the district court violated the Federal Rules of Criminal Procedure and the Double Jeopardy Clause. Id. at 1554-57. The Ninth Circuit rejected these arguments because acceptance of the guilty plea was conditional: "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea." Cordova-Perez, 65 F.3d at 1556. The Cordova-Perez court thus went on to hold that the possibility that the court might vacate the guilty plea is inherent when acceptance of the guilty plea is conditional. The court also held that jeopardy does not attach when acceptance of the guilty plea is conditional. Cordova-Perez, 65 F.3d at 1556-57.

When the defendant in Cordova-Perez sought review by this Court, petitioner opposed a grant of certiorari, and agreed with the court of appeals' holding that "acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement." Brief for the United States in Opposition, at 6 n.4, Cordova-Perez (No. 95-9101). Although the conditional nature of the acceptance of the guilty plea was necessary to the court of appeals' holding in Cordova-Perez, petitioner did not think this Court's review was needed to resolve the question of whether deferment of acceptance of the plea agreement necessarily carries with it deferment of acceptance of the guilty plea. In this case,

where that holding it to its disadvantage, petitioner now thinks otherwise.

If the guilty plea is conditional and has not been finally accepted, then the requirements of Rule 32(e) do not apply. That such a guilty plea can be withdrawn for any reason that the defendant deems sufficient neither renders the Rule 11 proceeding a mere formality nor undermines the solemnity of the proceeding, as petitioner fears. Pet. 8-9. Even if a defendant can withdraw a guilty plea at will, the Rule 11 colloquy remains a significant event--the district court must still comply with all the requirements of Rule 11, personally advising the defendant of the nature of the charges, the possible penalties, and the constitutional rights waived by the guilty plea. That the defendant is not bound by the agreement until later does not make the taking of the plea any less important. If anything undermines the solemnity of the Rule 11 proceeding, it is the deferment of the acceptance of the plea agreement, or the entry of a plea prior to review of the presentence report.

The holding that a defendant can withdraw for any reason before acceptance of the plea agreement does not render Rule 11(e)(4) superfluous. Rule 11(e)(4) provides, in pertinent part, "[i]f the court rejects the plea agreement, the court shall ... afford the defendant the opportunity to then withdraw the plea." Citing this language, petitioner claims that Rule 11(e)(4), "provides that the defendant has an absolute option to withdraw his guilty plea under one circumstance-where the court rejects the

plea agreement." Pet. 9 (emphasis added). Petitioner ignores the context of the language it cites.

Rule 11(e)(4) is not a rule setting out when a defendant can withdraw a plea of guilty. Rule 11(e)(4), which is entitled "Rejection of a Plea Agreement," simply sets out what the district court must do upon rejecting a plea agreement: inform the parties of the rejection of the agreement; advise the defendant that the court is not bound by the agreement; afford the defendant the opportunity to withdraw; and advise the defendant that if he or she persists in the guilty plea, that the disposition may be less favorable than contemplated by the agreement. Pet. App. 22a. The rule does not purport to set out all of the circumstances under which a defendant can withdraw a guilty plea. It would not make sense to place under the heading "Rejection of a Plea Agreement" a provision for withdrawing from a guilty plea when the district court has not yet rejected the agreement. Since Rule 11(e)(4) does not set out all of the circumstances under which a defendant can withdraw from a plea agreement, the court of appeals decision allowing withdrawal in a circumstance not covered by Rule 11(e)(4) is not in conflict with that rule.

Because the court of appeals' decision is not in conflict with the federal rules of procedures, review by this Court is not warranted.

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CONCLUSION

For the foregoing reasons, respondent Robert E. Hyde requests that this Court deny the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit reversing his conviction.

Dated: December 23, 1996

Respectfully submitted,

Jonathan D. Soglin
Attorney for Respondent

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SENTENCING GUIDELINES PROVISIONS:

NO. 96-667

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner,
v.
ROBERT E. HYDE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia nonprofit corporation whose membership is comprised of over 5,000 lawyers and 25,000 affiliate members. Members include citizens from each state who serve in positions which bring them into daily contact

with the criminal justice system as advocates and law professors in state and federal courts. The NACDL is a national bar organization which is working on behalf of public and private defense lawyers and is dedicated to the preservation and improvement of our adversary system of justice. The American Bar Association recognizes the NACDL and awards it full representation in the ABA House of Delegates.

The parties have consented to the filing of this brief of *Amicus Curiae* by letters filed with the Clerk.

SUMMARY OF THE ARGUMENT

Because the defendant who enters a plea waives many of his fundamental constitutional rights concerning trial, the Due Process clause is implicated in the analysis of plea bargain procedures. Furthermore, the Ninth Circuit's decision will not cause disruption or instabilty in the criminal justice system.

ARGUMENT

ADOPTION OF THE *HYDE* RULE WILL NOT DISRUPT THE ORDERLY ADMINISTRATION OF JUSTICE.

A. Ruling Below.

In the case below, the Ninth Circuit found that, where the trial court accepted a defendant's guilty plea but postponed its decision on whether to accept the accompanying plea agreement, the defendant possessed the right to withdraw his plea. The defendant could do so "for any reason or for no reason," *United States v. Hyde*, 92 F.3d 779, 781 (1996).

The Ninth Circuit held that a defendant could withdraw his guilty plea without showing cause at any time prior to the court's acceptance of the plea agreement. *Hyde*, 92 F.3d at 781. The court found that because the plea and the plea agreement were "inextricably" linked, Mr. Hyde's guilty plea lacked finality as long as the district court deferred decision on the agreement's validity. *Id.* at 780. The court noted that the distinction between the plea and plea agreement was a "distinction without a difference." *Id.*

B. Allowing a Defendant to Withdraw His Guilty Plea Prior to the Court's Acceptance of the Accompanying Plea Agreement Will Not Interfere With the Fair and Effective Administration of Justice.

1. Plea Bargaining Has Due Process Implications.

Petitioner claims that the Ninth Circuit's decision "is without foundation and threatens to inject instability into the resolution of criminal cases through guilty pleas." Pet. Br. at 16. To the contrary, the criminal justice system does not suffer from Petitioner's dire predictions if defendants retain the ability to withdraw their plea at this preacceptance stage.

Adoption of the *Hyde* rule is consistent with fundamental fairness and is a recognition that there is a due process component to the plea bargaining process. In *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973), the First Circuit, acknowledging the constitutional implications of plea bargaining, stated:

> Plea bargaining is a fundamental part of our criminal justice system as presently structured.

> It produces prompt adjudications of many criminal prosecutions, thus reducing the period of pre-trial detention for those unable to make bail and permitting more extensive consideration of the appropriate disposition. These benefits flow, however, from the defendant's waiver of almost all the constitutional rights we deem fundamental.

2. It is Likely to be the Rare Case Where a Defendant Seeks to Withdraw His Guilty Plea Pending the Court's Acceptance of the Plea Agreement.

Amicus Curiae suggests that it is unlikely that affirming the Ninth Circuit's decision will result in defendants routinely deciding to withdraw their pleas. There are strong incentives as well as disincentives which encourage defendants to abide by their pleas. In the overwhelming number of cases, defendants plead guilty based on the strength of the government's case and the consequent advantages of accepting the plea offer. Defendants who accept such offers typically have a good sense of the sentence range they are facing and ultimately receive a lesser sentence based on their plea.

Should a defendant withdraw the plea, stand trial and be convicted, he would most likely lose the benefit of the Acceptance of Responsibility reduction under U.S.S.G. § 3E1.1

of the Guidelines.[1] The Commentary to U.S.S.G. § 3E1.1 pertaining to this reduction states: "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."[2] When the case involves multiple counts, the prosecution could reinstate charges they had agreed to dismiss or file charges they had agreed not to institute. Additionally, the defendant may risk certain upward adjustments such as "Role in the Offense," U.S.S.G. § 3B1.1 or "Abuse of a Position of Trust," U.S.S.G. §3B1.3, based upon evidence adduced at the trial.

Thus, in practice, it will be the rare case in which a defendant will seek to withdraw his guilty plea made pursuant to the terms of a plea agreement.

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[1]For example, a Level 28 offender in Criminal History Category IV would be facing 110-137 months in prison absent the Acceptance reduction. With the reduction, his sentencing guideline range is 84-105 months assuming timely acceptance of the plea. See U.S.S.G.§ 3E1.1(b)(1) & (b)(2).

[2] This Commentary goes on to provide that there are "rare situations" in which a "defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial," and suggests as an example the situation where the defendant seeks to preserve a constitutional or statutory challenge. U.S.S.G. § 3E1.1, Application Note 2.

CONCLUSION

Because the Ninth Circuit's decision is consistent with notions of fundamental fairness and due process, it should be affirmed.

Respectfully submitted,

Lisa Kemler
Attorney for *Amicus Curiae*